DIARY FOR FEBRUARY.

2. SUN... *4th Sunday after Epiphany.*
3. Mon... Hilary Term begins. Articled Clerks and Students to give notice for inter-exam.
4. Tues... New Trial Day, Q. B.
5. Wed... Inter-exam. Law Stu. and Art. Clerks. N. T. Day, C. P.
6. Thurs.. Paper Day, Q. B. New Trial Day, C. P.
7. Fri.... New Trial Day, Q. B. Paper Day, C.P.
8. Sat.... New Trial Day, Q.B. Paper Day, C.P.
9. SUN... *Septuagesima Sunday.*
10. Mon... Paper Day, Q.B. New Trial Day, C. P.
11. Tues... New Trial Day, Q.B. Paper Day, C.P. N T. Day, C. P.
12. Wed... Last d. for set. down and giv. not. re-h. in Chy. P. D., Q. B.
13. Thurs.. Op. D., Q. B. P. D., C.P. Last d. for ser. for Co. Ct. York.
14. Fri..... New Trial Day, Q. B. Open Day, C. P.
15. Sat.... Hilary Term ends. Last day for Art. Clks. and Students to give notice for prim. exam. and for call.
16. SUN... *Sexagesima Sunday.*
20. Thurs.. Tithes abolished in Upper Canada 1823. Re-hearing Term in Chancery begins.
23. SUN.... *Quinquagesima Sunday.*
24. Mon.... Last day to declare for County Court, York.

CONTENTS.

THE
Canada Law Journal.

Toronto, February, 1873.

The Legislature is again asked, by means of an amending act, to aid the children of the late Mr. Goodhue in defeating their father's will. With this action on the part of the promoters, the public have nothing to do, except to protest against legislation of such a vicious tendency. The Bill being an Estates Bill, has been sent to the judges to report upon. We can only surmise what their report will be from what they have expressed in their judgments. If they report against it, the fate of the Bill is sealed; unless, indeed, we suppose the impossible result of the House acting contrary to the opinion of that very body it has itself constituted to advise upon such matters as this. We very much mistake the Premier also, if he would permit the Bill to pass contrary to the public opinion, which has set its face against legislation which would tamper with the rights of private property. There has been too much of that sort of thing already in the Legislature of Ontario.*

The *Weekly Reporter*, seized apparently with a desire to keep pace with the non-legal press in the coinage of new words, lately headed one of its cases, *Re Cubley's Trusts*, 21 W.R. 170, in this way—"Pauper becoming *propertized*." Surely, law jargon is sufficiently barbarous already, without adding to the vocabulary by modern innovations.

Of all the judges of first instance in the English Court of Chancery, the decisions of V. C. Wickens are, as a rule, the only ones which go through appeal un-

* Since the above was written, the judges have in an unanimous report advised against the Bill. We will publish their report next month.

scathed. Of the others, but especially Malins V. C., the reversals of their judgments are, as the *Solicitor's Journal* puts it, "uncomfortably numerous." It is said that Counsel now advise after the following fashion: "Such is the effect of the late decision of V. C.—, but as it seems almost a matter of course to appeal against his decisions, you should wait a bit, or make enquiries if an appeal is entered, or likely to be."

The Exchequer Chamber, in *Mouflet* v. *Cole*, 21 W. R. 175, has definitely determined a much-vexed question as to the manner of measuring distance, in, for instance, covenants in restraint of trade, where a person binds himself not to carry on a certain business within five or six miles of a given point. They hold that it is to be measured by a mathematically straight line from point to point, as on a map, disregarding inequalities of ground and the curvature of the earth's surface. The advantage of such a mode of measurement is that it will not be liable to change with changing circumstances, but will remain permanently the same.

Mr. Charles Edward Pollock, Q. C., has been appointed to fill the vacancy in the Court of Exchequer caused by the retirement of Baron Channell. Sir George Honyman was mentioned as a likely man, but choice has fallen upon the son of the late Sir Frederick Pollock. The *Law Times* considers the appointment, standing alone, unobjectionable, but not the best that could have been made. It says:—

"The new Baron is what is known as a good all round lawyer. His experience has been of that miscellaneous character which makes a useful but not a powerful judge. The same remark may be made of the two previous appointments, and for this very reason it was hoped that one of our prominent commercial lawyers would be selected by the Government. Of all the courts the Court of Exchequer is the most colourless, if we put on one side the remarkable and, if we may use the expression, almost brilliant common sense of Baron Bramwell. The judges are painstaking and fairly able. The new Baron is cast in the same mould. Whilst, therefore, we have nothing wherewith to be discontented we have somewhat to regret, and trust that the mistake will be remedied when it becomes necessary to fill the expected vacancy in the Court of Common Pleas."

JUDICIAL SUGGESTIONS FOR LAW AMENDMENTS.

(I.) "I trust the Legislature will yet make the law of evidence what it ought to be—the means of bringing out the truth, fully and freely, untrammelled with the fetters and perplexities of a gone-by age and system. After a wife has been allowed, in an action to which her husband was not a party, to be asked whether he was 'a fit man to be believed upon his oath: *Annesley* v. *Earl of Anglesea*, 17 St. Tr. 1276; and after a wife has been permitted to prove that she was married to her husband before the time he swore he was married to another, a pauper, in a settlement proceeding: *Rex* v. *Inhabitants of Bothwell* 2 B. & Ad. 639; see *Reeve* v. *Wood*, 5 B. & S. 364; and since either husband or wife may prosecute the other criminally for personal violence done by one to the other, and may testify in the cause,—there need be no scruple in putting them under the like law in all civil proceedings where they are both, or either of them personally interested:" Per Wilson J., in *Toms* v. *Township of Whitby*, 32 Q.B. (Ont.) 252.

(II.) Speaking of 29, 30 Vict. cap. 42, s. 6, the same Judge remarks: "It is calculated to give great embarrassment to sheriffs, and to create great difficulty to execution creditors. . . . . It is an inconvenient method of securing to the creditor first against goods the like rank against lands, to which he is plainly en-

titled. . . . A simpler way would have been to have authorized the *fi. fa.* to issue against both goods and lands at once, with a stay of proceedings against lands till the goods were exhausted; in which case no difficulty of any kind would ever arise, and one execution would answer in every case instead of two:" *Gleason* v. *Gleason*, 4 Prac. R. 117. This is partially remedied by 31 Vict. cap. 25, (Ont.)

CONCERNING STATUTE LAW.

The Province of Ontario seems to be in a fair way of being governed overmuch. It is not only subject to the supreme legislative sovereignty of the Queen and the English Parliament, but also to the subordinate power of the Legislature of the Dominion of Canada, and, third in gradation, to the local authority of its own Provincial Assembly. Then, from one or more of these sources, we have sundry delegated functions of legislation entrusted to the judiciary and municipal bodies, which have their outcome in by-laws, rules of Court, and general orders. The law is now in a constant state of flux and change, not so much, as in former days, by the result of judicial decisions, as from the effects of legislative interference. Modern ideas have shot far ahead of the quiet wisdom which obtained in the days of Mr. Justice Fortescue Aland who, in the preface to his reports, tells us that the grand division of law is into the Divine Law and the Law of Nature, so that the study of the law in general is the business of men and angels. He says, "Angels may desire to look into both the one and the other, but they will never be able to fathom the depths of either," and he then goes on to give his opinion, modestly but firmly, that "of all the laws by which the kingdoms of the earth are governed, no law comes so near this Law of Nature and the Divine Pattern as the Law of England."

But the wonderful progress of modern times has produced a corresponding growth in the statute law of the realm and of the colonies, so that one may almost be tempted to say that the law of England and of Canada is now regarded as being chiefly of value because of its interminable capacity of amendment. There is a story recorded of Lord Coke, which Sir John Coleridge referred to the other day in the House of Commons. His lordship was one day playing at bowls with the Bishop of Norwich, when this dignitary, thinking he had hit upon one of the *mollia tempora fundi*, told his companion that he wished to ask him a question of law. Whereupon the great commentator observed: "If it be a question of the common law, I should be ashamed if I could *not* answer it; but if it be a question of the statute law, I should be ashamed if I *could* answer it." At that time all the volumes of the Statutes could have been carried easily in a wheelbarrow, yet such was Lord Coke's opinion as to the possibility of recollecting what Lord Thurlow afterwards emphatically called "the damned Statute Law!" We suppose it is quite useless to call the attention of the young law-makers of Ontario in Parliament assembled to these words, which we have penned more in sorrow than in anger. There is a rage for legislation abroad, and like other infectious disorders it will run its day in spite of pills and potions.

Yet there are three kinds of legislation wherein the Parliament of Ontario is exposed to special risks. The first we choose to indicate in the words of Mr. Markby, when speaking of the dangers which may attend subordinate legislation: "Where "the power of legislation is loosely con- "ferred on a variety of [bodies] it is cer- "tain there will be great confusion of "laws, and there is also great danger of "the worst of all evils, namely, of doubts "being raised as to whether the legisla-

"tive authority of some of the subor-"dinate bodies has not been exceeded. "For the supreme sovereign authority is "always obliged to allow the authority of "its subordinates to be questioned, in "some form or other, by judicial authority, "in order to keep up a check on their "usurpation of power; though sometimes "it resorts to that highly unsatisfactory "expedient for getting out of the diffi-"culty—an *ex post facto* ratification of "acts which are admittedly illegal."

The second arises from that dangerous kind of private legislation which is exemplified in the famous Goodhue case. The opinions of the learned judges in appeal, particularly that of Draper, C. J., the head of the Court, fully illustrate the evil of intermeddling with the testamentary dispositions of persons deceased regarding their property. It was but lately that we noticed one of the sprightliest judgments ever delivered by Baron Bramwell, wherein he makes a shrewd thrust at the Court of Chancery. He observes: "Originally the common law "treated the penalty of a bond as the "debt to be recovered, construing the "document on the principle that the "obligor in all probability meant what "he said. The Court of Chancery, how-"ever, thought that it knew what he "meant much better than he himself did, "and introduced, what I cannot help "calling the unfortunate practice of re-"lieving from the penalty on payment of "the sum named in the defeasance and "costs:" *Preston* v. *Davies*, 21 W. R. 128. But in Canada, instead of the Court of Chancery, it is the High Court of Parliament that merits the stricture when it assumes to know better than the persons themselves what testators should have done with their property.

The last case is the danger arising from short patchwork Acts introduced by volunteer members on their own responsibility, designed to cure some special case of hardship that has come under their own notice. The motive is laudable, no doubt, but it may prove disastrous. It was Lord Redesdale who said: "Re-"formers are too apt to look to one "grievance, and propose a remedy which "would produce a thousand." It is all very well when we find such a judge as Wilson, J., calling attention to the state of the law of evidence as regards husband and wife in the pointed observations already cited by us—it is right, in such a case, to bring in a bill, as has been done, to amend the law of evidence in that particular. It is time to legislate for the attachment of equitable debts, as is being done this session of the Ontario House, when we find a judge so careful and conscientious as the Chancellor thus expressing himself: "It is unfortunate in "the interests of justice, that the remedy "given by the Common Law Procedure "Act in case of garnishee proceedings "should not in terms apply to an equit-"able debt. The principle upon which "the Act proceeds applies to an equitable "debt as much as to a legal debt; and I "can see no reason why the creditor "should not have a remedy in the one "case as well as the other. As the law "stands it is an anomaly—but the remedy "is with the Legislature not with the "Court:" *Blake* v. *Jarvis*, 17 Grant, p. 204. But how many of the law measures of the Session find a foundation upon judicial utterances? The stand taken by the Hon. E. B. Wood against the experimental legislation of young members of the House has been most commendable, and we trust that the experience of the older heads may secure the withdrawal of all crude attempts at an amendment of the laws.

MARRIED WOMEN—THEIR RIGHTS.

The legal status of a married woman has been a subject of anxiety to Legislators of England. In our Ontario House there is a perfect craze on the subject, as evidenced by the Bills introduced this session. The old Common Law notion, that husband and wife are one person, is being rapidly destroyed. Legislation is now tending in the direction of making the wife "the best man of the two."

The first innovation was made by Courts of Equity, holding that a married woman possessed of separate property, and acting with respect to it, is compelled to act in all respects as if she were unmarried. But until recently there was no legislation of any kind, either in England or in Canada, altering her status because of her separate property.

It was in 1859 that the first act of the kind was passed, by the Legislature of the late Province of Canada. It recited that the law of Upper Canada, relating to the property of married women, was frequently productive of great injustice, and that it was highly desirable that amendments should be made therein for the better protection of their rights (22 Vict. cap. 34). It accordingly enacted that married women having separate property real or personal might hold the same free from the control or obligations of their husbands, and provided for the granting of orders for protection of separate earnings in certain cases, but it in no manner interfered with the estate of the husband or his wife's land, commonly called a tenancy by courtesy. It enabled married women to devise their separate property, but gave them no power to contract.

It was reserved for the legislature of Ontario in its wisdom to pass an act abolishing tenancy by courtesy, enabling a married woman to contract, enabling a wife to insure the life of her husband, enabling her to hold stocks in banks, insurance and other joint stock companies, to maintain actions in her own name, and generally do whatever she thinks good in her own eyes, (35 Vict. cap. 16). This act is carelessly drawn and leaves room for doubt on various points, and is an endless trouble to those upon whom it devolves to apply and interpret it.

The minor idea of separate estate is now merged in the larger idea of separate existence. The old idea of unity of interest and unity of purpose, producing domestic bliss, is exploded. It is now supposed that families can be better brought up by having two heads to the house, and two houses also if thought desirable. Dependence of the wife on the husband is a thing of the past. Wives must be taught to depend on their separate estates, and if that be found insufficient the ability to insure the lives of their husbands and collect the insurance money, however sudden or mysterious the deaths of the husbands, will be all that is necessary to replenish the purse of the sorrowing widow. All that now is required to cap such legislation is to declare that every woman shall be a man, the provisions of nature to the contrary notwithstanding.

Sometimes we labour under the hallucination that legislation is needed to remedy some grievance or remove some abuse. Our fathers acted on some such principle, but now without grievance and without abuse it would seem that there must be legislation for the sake of legislation. Submission to endless and needless legislation seems to be the doom of man. Members of Parliament now we fear legislate not so much to meet the necessities of the people as to gratify their own vanity. With legislation for the sake of legislation we have no patience, and against it, as against all change for the sake of change, every lover of his country must strongly protest.

The Bills which have so far been introduced are only five in number; how many more are coming we do not know. Four of them are respecting conveyances by married women, and one is to amend the act to secure to wives and children the benefit of assurance on the lives of their husbands and parents. The most comprehensive and logical of the first batch would, by its first section, give a married woman full power to convey her real estate or chattels by any form of conveyance by which, if she were a *femme sole*, she could convey the same without the consent of her husband, and without any examination before any judge, or any other man, in the same way as if she were sole and unmarried. (It is perhaps defective in not providing that the would be grantor should, before executing any conveyance, obtain the consent in writing of at least two of her female bosom friends, with their coinciding reasons appended thereto. We throw out this suggestion as likely to prevent undue haste.) The second section simply abolishes tenancy by the courtesy. Another Bill would render the concurrence of the husband unnecessary in the case of his being a lunatic, idiot, in prison, beyond seas, living apart from his wife by mutual consent, or incapable of executing a deed from any other cause whatever, provided only that the county judge must dispense with such concurrence. Another Bill would make a somewhat similar provision, requiring however the consent of a judge of one of the superior courts. The remaining provisions in these and other Bills are intended to get rid of any possible objection to conveyances by married women, where there may have been defective execution under previous statutes. Such measures as these, if careful provision be made to prevent injustice, are in the main unobjectionable.

We do not pretend to deny that there has been much cause for some provision to emancipate a woman from a husband who reduces his wife and children to beggary and starvation, and squanders his and their earnings in drink, or for a measure which, if possible, might protect the wife from a husband's brutality. But we must implore a little caution before crude Bills are rushed through the House with break-neck speed: resulting in acts which tend not only to loosen the matrimonial tie, but which disarrange the laws of property, open the door to all sorts of fraud, and make those very married women whom it is designed to protect the prey of designing wolves in sheeps' clothing.

Looking at the remedial clauses in some of the Acts and Bills we have referred to, one is apt to exclaim how was it possible for married women to have existed before such legislation. If the provisions therein contained are really necessary to do justice to the rights of married women in the past, they must have been indeed a downtrodden race. But modern history fails to show that such was their condition, except in peculiar cases which have been guarded against as fully as would seem possible in such a delicate matter. The danger of speculative legislation is that abuses will be created where none now exist, and this is a danger which "prentice hands" at legislation seem to overlook.

In many respects the old Common Law under which our mothers, grandmothers, and great grandmothers lived and died was the perfection of reason. Legislation of a social character where no such legislation is needed is the perfection of folly, not to say madness. We think there has already been too much sentimentalism on legislation as to married women. We doubt much if their happiness is at all likely to be promoted by legislation which they do not want, which they have not asked, and which when obtained will be but little used, except for purposes of fraud.

It is just possible that such a state of things may arise as will enable the wife who owns all the property to make all the profit, while the husband who owns nothing will make all the losses. Division of responsibility in such matters is detrimental to the public good. It is the interest of the public that men should honestly pay their debts and not be encouraged to live in affluence in defiance of their creditors, upon the so called separate estates of their wives. We shall be greatly mistaken if the tendency of such legislation as we have noticed, is not to promote domestic uuhappiness, and encourage widespread fraud.

LAW SOCIETY.

Hilary Term, 1873.

CALLS TO THE BAR.

The following gentlemen passed the necessary examinations this term, for call to the Bar:—Messrs. John G. Killmaster, (Simcoe), without an oral examination; Robert Heber Bowes, (Toronto), having passed last term as an Attorney, also without an oral; Messrs. Isaac Baldwin McQuesten, (Hamilton); James Richardson Roaf, (Toronto); and Allan J. Lloyd, (Barrie), after an oral examination.

ATTORNEYS ADMITTED.

The following gentlemen were admitted to practice as Attorneys:—Mr. R. J. Wicksteed, of the Quebec Bar; Messrs. Robert McMillan Fleming, (Toronto), James Bruce Smith, (Lindsay), and John G. Killmaster, (Simcoe), without an oral examination, having obtained more than three-fourths of the maximum number of marks. Messrs. Allan J. Lloyd, (Barrie), Peter Cameron, (Kingston), Isaac Baldwin McQuesten, (Hamilton), and James Richardson Roaf, (Toronto), also without an oral, having already been called to the degree of Barrister-at-law; and Messrs. Rupert Etherege Kingsford, (Toronto), and Alex. Sampson, (Toronto), after an oral examination. The names in each list are given in the order of merit.

STUDENTS ADMITTED.

The following gentlemen were admitted as Students-at-law, having passed the required examination.

In the University class:—Messrs. James Joseph Wadsworth, M.A., Alexander Haggart, B.A., Samuel Clarke Biggs, B.A., Elliott Travers, B. A., Julius Lefebure, B.A. And in the Junior class:—Messrs. Charles H. Connor, (974 marks out of a possible 1000), Thomas G. Meredith, (890 marks).

RULES OF THE LAW SCHOOL.

We have published in another place a short advertisement on this subject; and in last month's issue we alluded to the objects and Constitution of the Law School. We now publish *in extenso* the "Rules for the establishment of a Law School." This will probably give all the information which students can want on the subject; if not, we shall be happy to do what we can to put right any of the cautious ones who may be in doubt. Before asking any questions, however, we should recommend our young friends, as a matter of practice, carefully to read the rules, and fully discuss the doubtful point in their own minds, or among themselves. The result will probably be that the trouble of a letter may be saved, and themselves be certainly much benefitted.

The Rules are as follows:—

1. The Law Society hereby establish a Law School.

2. The staff of the Law School shall consist of Four Lecturers, who shall be Barristers-at-Law, and hold office for three years, and one of them shall be appointed by the Benchers, President of the Law School.

3. The Lecturers shall be styled of General Jurisprudence, Real Property, Commercial and Criminal Law, and Equity.

4. The course in the School shall consist of Lectures, Discussions, and Examinations, between the first of November and the first of May.

5. The attendance in the School shall be voluntary. The students shall be divided into the junior class and the senior class. Any student or articled clerk shall be entitled to admission to the junior class, and having passed through the junior class or being of two years' standing on the books of the Society or under articles to admission to the senior class.

6. Intermediate and Scholarship Examinations for Special Honors, Certificate of Fitness, and Call to the Bar, shall be conducted in the Law School, and may be had either in term or vacation as the Treasurer of the Law Society shall from time to time determine, and all such examinations, except Intermediate, shall be conducted in the presence of three Benchers, who shall attend in rotation, or provide substitutes.

7. Scholarships shall be of the same tenure and value as at present, and shall be open to general competition.

8. Special Honors shall consist of periods of allowance granted in pursuance of the Statute; any student in the School who has attended courses of both the junior and senior class, and passed the requisite examinations, shall be awarded a reduction of six, twelve, or eighteen months; or who has attended the course of, and passed through the senior class only, and passed the requisite examinations, shall be awarded a reduction of six or twelve months, according to the results of the examinations in each case.

9. All periods of allowance granted shall be taken and allowed as a part of the term of studentship or clerkship on call to the Bar or admission as an Attorney; and if allowed to a student, shall be available to him as an articled clerk, and if allowed to him as an articled clerk, shall be available to him as a student.

10. The Law School shall furnish Convocation certificates of the results of the various examinations signed by the President of the School, which shall be confirmed by Convocation before taking effect; and any period of allowance granted and confirmed, may be certified to the person to whom it is granted, by the Treasurer of the Law Society, under his hand and the seal of the Society.

11. The duties of the Lecturers shall be to deliver *viva voce* lectures; to prepare all questions for the examinations, whether oral or written; to select all questions for discussion; to preside in turn at meetings for discussion; to attend all examinations; and to arrange the hours for lectures, examinations, and discussions; and all questions for examination and subjects of discussion shall be approved by the President of the School.

12. There shall be a Council of the Law School, to be composed of the Treasurer of the Law Society, the Chairman of the Legal Education Committee, and the President of the Law School.

13. The Council of the Law School shall arrange the subjects and books for lectures and examinations, and the days for the several examinations, except those during the course in the School, which shall be fixed by the lecturers, shall have power to sanction any change of duty among the lecturers, and to grant leave of absence to any of the staff, or any student in the School. The Council shall also publish whatever they may deem necessary.

14. The salaries of the lecturers shall be as follows:—The President of the School, one thousand dollars per annum; the other lecturers, each eight hundred dollars per annum; such salaries to be paid quarterly from the first day of January next.

15. The first course in the Law School shall be of three months only, from the first of February to first of May, 1873.

Not content with the elective franchise, seats in legislatures and in congress, et-cetera, the colored men are about making strong efforts to secure a recognition from the administration by the appointment of a negro to the cabinet of the next term. The coming man is John M. Langston, a well-known colored lawyer, and the coveted position the attorney-generalship. The arguments advanced are that the colored men have, as a class, stood by President Grant, and have contributed largely to his re-election, and are therefore entitled to this recognition at his hands. The Washington *Chronicle* is in the movement. Considering the saltations of the colored race during the last five years, their representation in the cabinet is by no means improbable, but it will doubtless be as well for all parties to have that event postponed for a time.—*Albany Law Journal.*

SELECTIONS.

CONCERNING SEALS.

Few things will bear less looking into, with other eyes than those of habit, than the theory of the common law concerning seals. Established as this theory was in days of ignorance, it derives its support from prescription and usage rather than from intrinsic worth. The fact is that the law moves much like the gods of Homer—an interval of ages between the steps. In that alone we are accustomed to forget that the world is a world of progression, and that what was good three centuries ago may possibly not be good now. In that alone we are wont to believe that the common law, like another Minerva, was knocked, complete, out of a few sage Anglo-Saxon heads, and that all that remains for subsequent generations to do is to hand this "torch of truth" along the line. While it comes rather hard to conscientiously believe that the common law is literally the perfection of human wisdom, we can readily concede its many and great excellencies. What it needs is pruning—the lopping off of some things that have outlived their usefulness. To the plain man, unversed in the wonderful mysteries of the law, the legal effect of a seal can hardly fail to seem less than a miracle. The simple wafer must appear to him like "some amulet of gems annealed in upper fires." Why it should have the consecrating influence the law imputes to it, he will never be able to understand, and we very much doubt if any one else will ever understand it.

A little investigation of the history of seals shows, clearly enough, that they were originally used only as a make-shift for writing. Blackstone gives the following account of them: "The method of the Saxons was, for such as could write, to subscribe their names; and whether they could write or not, to affix the sign of the cross, which custom our illiterate vulgar do, for the most part, to this day keep up by signing a cross for their mark, when unable to write their names." "In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names; which custom continued when learning made its way among them, though the reason for doing it had ceased. At the conquest, the Norman lords brought over into this kingdom their own fashion, and introduced waxen seals only instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward I, every freeman, and even such of the more substantial villians as were fit to be put upon juries, had their distinct particular seals."

A seal was certainly useful to a Norman that could not write, and of significance when each had his particular signet; but when writing became common and the distinctive character of the seal lost, sealing became a mere hollow form; as Blackstone says, "the reason for doing it had ceased." At common law a seal was "wax impressed, because wax without impression is not a seal" (3 Inst. 169); but even these requisites, *wax* and *impression*, are dispensed with in most, if not all the States, and in some of them a mere scrawl of the pen is held sufficient. Not equal to the task of freeing ourselves from this venerable superstition, we make the observance of it as easy and meaningless as possible. Chancellor Kent thought that this legalizing of pen-flourish seals "is destroying the character of seals, and is in effect abolishing them and with them the definition of a deed or speciality, and all distinction between writings sealed and writings unsealed." 4 Kent's Com. 445.

Now, to the lawyer, accustomed to look upon a seal much as a heathen does upon his idols, this may seem very bad, but to a layman it would probably appear of little moment whether the "distinction between writings sealed and writings unsealed" were preserved or not.

It seems to us rather absurd to be told by learned judges that "sealing is a relict of ancient wisdom," and yet such expressions are found in our reports of comparatively recent date. For instance, in *Jackson* v. *Wood*, 12 Johns. 73, we find the following: "This venerable custom of sealing is a relict of *ancient wisdom*, and is not without its real use at this day. There is yet some degree of *solemnity* in this form of conveyance. A seal attracts attention and excites caution in illiterate persons, and thereby operates as a security against fraud. If a man's freehold might

be conveyed by a mere note in writing, he might be more easily imposed on by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a note or a letter." This is simply begging the question. So long as our laws relating to attestation and acknowledgment of conveyances are preserved there is little danger of one's conveying his freehold by "a mere note in writing," or of his mistaking the character of the instrument he is signing. The danger is surely not lessened by the seal, considering the character of the seals in common use. But aside from this, the reason is very weak. If a man can write he can read writing and can know what he is signing. If he cannot write, he is too ignorant to know any thing about the *solemnity* of a seal. Besides, the seal is usually, we might say always, affixed by the scrivener, and the parties pay little or no attention to it, and know little and care less about it.

We do not object to seals for the reason of the trouble of affixing them, but because they have been and are the fruitful source of perplexities and distinctions in contracts—of litigations, of dishonesty, and of inequity. Years of toilsome research would hardly make one perfect in the reported cases on the question of seals.

Take a single case, that of *Jackson* v. *Wood*, to which we before alluded. The question was solemnly discussed whether a freehold could be conveyed without a seal. The party selling the land received its full value; the instrument of conveyance was ample and explicit, and was signed in the presence of two witnesses. But the talismanic charm of the seal was wanting, and, therefore, it was decided that the heirs of the grantor should recover back the land, though it had been in the possession of the purchaser for twenty years. So much for the lack of a little wafer. So, again, in another case, *Ayres* v. *Harness*, 1 Ohio, 368, a person indebted to another, in a sum not exactly ascertained, wrote his name upon a blank paper and made his seal (a scrawl) in the presence of a subscribing witness, and authorized that other to fill out an obligation for the amount found to be due. The paper was filled up accordingly, but the scrawl was there, and the obligation was held, *for that reason*, invalid. Had that been omitted the legality of the instrument would have been perfect; and yet, according to the theory of seals, they import deliberation, and, therefore, much more than a signature, should bind the obligor. This result of sealing may be law, but it is neither justice nor common sense. Examples might be multiplied indefinitely, but enough, we trust, has been said to lead to the conviction that the seal is nothing more than a naked, useless, absurd formality, expressing nothing, meaning nothing, proving nothing; while, at the same time, the most important legal consequences are suffered to depend upon it. Is it not time that this absurdity was dropped out of our law?—*Albany Law Journal.*

A FEW WORDS ABOUT MANY REPORTS.

It is the general impression of the legal profession that they are "over reported"—that the rapid increase of the reports of judicial decisions is a grievance. It is thought that a vast number of reported cases is an incumbrance and stumbling-block which impede the acquisition of a knowledge of the law as it exists; that it "destroys the certainty of the law and promotes litigation, delay and subtilty;" and that it imposes a needless and onerous burden upon the purse and time to purchase and study even a portion of the annual issue. While this may be partly true, there are considerations on the other side which it may be as well for us not to forget.

It is a well-known fact that the diversity of relations which arise in life is so boundless, the modifications to which property is susceptible so various, the combination of circumstances so shifting and complex that legislation must necessarily be general. The result of this is, that but comparatively few of our rights or duties are or can be prescribed by positive law. For all these we are left to the wisdom and discretion of the judges, who deduce from the general propositions the legal corollaries applicable to each particular case. These deductions form the great body of the law of the land, and are, as Kent says, "the best evidence of the common law." These decisions become precedents for future cases resting

upon similar facts, and are regarded as the "highest evidence which we can have of the law applicable to the subject."

Now, considering the infinitely various rights, relations and duties of men, the cases upon which judges are called to adjudicate are constantly presenting new phases and different combinations of circumstances, so that it not unfrequently happens that a judicial decision upon analogous facts cannot be found. The greater the number of reported cases, the more likely are we to find the opinions and judgments of wise and experienced judges upon cases similar to those we may have in hand. And we all of us know how valuable is even one good precedent, and how diligently and anxiously the books are searched therefor.

But it is urged that this multiplication of reported decisions, some of which will no doubt be erroneous, will furnish mischievous precedents to those judges of narrow or timid minds, who, entirely ignoring reason and principle, follow the precedents as blindly as the Pagan deities followed the decrees of Fate. Such cases are not likely often to occur, and when they do it is fairly questionable whether the following of a bad precedent is not the lesser of two evils, for such a judge is likely to go wrong any way, through influence of public opinion, or of the wealth and standing of one of the parties, or of the power of an advocate, or of some of those countless things that so continually shape the actions of the weak and timid. If a judge be arbitrary or corrupt he will be much more likely to do justice with two or three precedents to restrain him, than if left untrammelled to gratify his own passions or prejudice.

One great advantage derived from the publication of judicial decisions is the beneficial influence it has upon the judges. No judge is apt to decide a case rashly or corruptly, or against the known law, if he knows that his decision will be exposed to public notice and criticism. Mr. Justice Blackburn said recently: "The only real practical check upon the judges is the habitual respect which they all pay to what is called 'the opinion of the profession.'" It is only when decisions are made "*in tenebris*, or *sub silentio*," as Lord Coke has it, that much is to be feared from the bench.

When the judges' decisions are made public, they feel that each one will not only put at stake their reputation for wisdom and integrity among their contemporaries, but must abide the judgment of posterity; and they therefor act under a deeper sense of that power, which is the great regulator of human conduct—public opinion.

It is quite true that few, if any lawyers can afford to purchase all the reports, and none can ever read all the cases, but this is no reason why reports should not be issued. Every one can make his selection according to his needs and ability. He will have occasion to read but a comparatively small portion of the cases, but by the aid of the excellent digests, indexes, and works of reference extant, he will have access to all that is really valuable. We never hear the complaint made that there are too many books published in the other professions and sciences, although no one can read or even purchase all the works that have been written on many of the sciences, —and yet we complain of too many books on the law, in the ashes of which it is said are taken up, "the sparks of all sciences in the world."—*Albany Law Journal.*

LADIES OF THE LONG ROBE.

"But what profession is your choice?" asks Mephistopheles; to whom the student, "Law shall not ever have my voice." "In this, I own, you show discerning; I know, and do not love this learning." But, is it possible that the student now should be a lady, and that the law should be her choice? The answer is furnished by the following extract from *The Law News* (St. Louis, U. S. America, Nov. 22, 1872):—

"Mrs. Clara Hopgood Nash, of Columbia Falls, has been admitted to practice as an attorney and counsellor-at-law in the Supreme Judicial Circuit of Maine. She has the honor of being the first lady admitted to the bar in New England.

"Miss Lemma Barkaloo, whose death is so deeply regretted, was the first of her sex admitted to the St. Louis bar.

"Miss Phœbe Couzins promises a successful career in the Missouri practice. Her fine talents entitle her to a high rank in her profession.

"Mrs. Bradwell, of the *Chicago Legal News*, has demonstrated the fitness and ability of her sex to occupy legal stations with high credit."

Commend us especially to the learned editress. Having demonstrated the legal aptitude of her *sex*, the only question remaining is, Who will be the first to attain the highest judicial promotion? Shall it be Mrs. Baron Bradwell, Miss Justice Phœbe Couzins, or Lady Chancellor Clara Hopgood Nash? The ex-member for Derry, indeed, replying to Sir J. Coleridge, in the debate of the House of Commons last session on the Woman's Suffrage question, though admitting his consciousness that many a judge had been an old woman, submitted "that was no reason why every woman ought to be a judge." The St. Louis *Law News* does not see this. Since when Numa listened to sweet Egeria, has not the sex, "the favorite of the law," evinced its peculiar legal capacity? Juvenal describes the Roman ladies, in his time, as eager to refine upon

> "The finest subtleties of law,
> And raise litigious questions for a straw;
> They meet in private, and prepare the bill,
> Draw up the instructions with a lawyer's skill,
> Suggest to Celsus where the merits lie,
> And dictate points for statement or reply."

And doubtless, whatever the *quodlibet* propounded to your lady of the long robe —the English Inns of Court have just heard of her, and her inevitable incursion we, too, must anticipate—"the Gordian knot of it she will unloose, familiar as her garter." What if, ere yet, "the mute wonder lurketh in men's ears to steal her sweet and honey'd sentences," some natural diffidence beset the fair aspirant. in her first acquaintance with "the tedious forms, the solemn prate, the pert dispute, the dull debate" which, according to Sir William Blackstone, occupy the attention of "the drowsy bench, the babbling hall." "All orators are dumb when beauty pleads," says Shakespeare, and besides, the lady is only, like Curran, to imagine that she feels her little ones tugging at her gown, and, like the great orator, she will forthwith be enabled to add the attraction of her voice to the rhetoric of her glance. Then shall Miss gradually advance, bully your witnesses, and "sound her quillets shrilly." In the next day's paper, a critique of her performance will appear, nauseating as those of which the stage now enjoys a monopoly. We shall be told that the fine talents of Miss Augusta Coke entitle her to a high rank in her profession, that, in consequence of a slight cold caught at a ball on the previous evening, her exquisite soprano voice was not as liquid as usual, during her powerful appeal in the case of *Smith* v. *Smith*, but that, later in the day, we were happy to observe that she had quite recovered, charmed the Barons of the Exchequer in *Jones* v. *The Lord Lieutenant*, and, according to her wont,

> Dropt manna, and could make the worse appear
> The better reason, to perplex and dash
> Maturest counsel learned in the law.

Certes, your sweet girl Templars would protest against "sitting under" an effete old bachelor, ætat. 87, as lecturer, who, if he thought to improve the occasion, would "woo in language of the Pleas and Bench." But verily, many a change the latter days will bring forth. And revolution, we need hardly add, will also take place in our law reports. No longer dry legal decisions like *Loughnan* v. *Barry*, our reports shall revile the *Case of Swans* (7 Rep.), where it is held that cygnets belong equally to the owner of the male and the owner of the female swan, "the "reason therefor being founded on a "reason of nature; for the cock swan is "an emblem or representation of an affec- "tionate and true husband to his wife, "above all other fowls; for the cock swan "holdeth himself to one female only, and, "for this cause, nature has conferred on "him a gift beyond all others; that is "to die so joyfully, that he sings sweetly "when he dies; upon which the poet "saith :—

> "'Dulcia defecta modulatur carmina lingua
> Cantator, cygnus, funeris ipse sui, &c.'"

Of course the text-books of the future will come out on toned paper, with illustrations by Millais. And the leaders of the Irish Law Times will become quite anacreontic; while a dictum of Fitzgerald, B., will be cited along with a quotation from Tennyson, for, as the father of English jurisprudence saith, "It standeth well with the gravity of our lawyers to cite verses." We shall endeavour to secure the service of an epicene editress, and, under such auspices, our Christmas Number hereafter will, doubtless, by a little refreshing variety, prove the falsity of the proverb that "Lady Common-Law must lie alone."—*Irish Law Times.*

We believe that unless some strong steps are taken to regulate the business in the Common Law courts, a crisis will soon occur which will entail the most inconvenient consequences. It is no doubt gennerally known that it is open to attorneys or suitors to select the court in which to enter their cases: and it is not unnatural that there should be a tendency towards the strongest tribunal. By an almost unprecedented combination of circumstances, the popular choice and professional choice also has lately been driven upon the Court of Queen's Bench. Whilst the members of the other courts most famous for their judicial ability have been lost by death, or contemplate retirement, the Court of Queen's Bench has attained as high a reputation as it is possible for a court of law to acquire. The result is as we have stated, that the business is rapidly becoming too large to be dealt with satisfactorily. It has been mentioned to us that a firm of attorneys in the City, largely engaged in mercantile business, who, so long as Mr. Justice Willes sat in the Common Pleas, entered their cases in that court, have now commenced to transact their business in the Queen's Bench. But whilst remarking upon this fact, which no doubt is one instance out of several, it is only fair to say that there is at present little to justify the mistrust of the Judges upon whom some slur might be supposed to be cast by these remarks. As regards the Court of Common Pleas, it has been an unfortunate court. Within a short period it has lost two eminent lawyers particularly skilled in mercantile law—Mr. Justice Willes and Mr. Justice Montague Smith. It has also been unfortunate in being made the highway among which a coach-and-four was driven through an Act of Parliament to land Sir Robert Collier in the Privy Council. Furthermore, one of its vacant seats has been made available as a means of acknowledging scientific eminence and a large knowledge of a branch of law which, as a general rule, does not arise for discussion in the Court of Common Pleas. Therefore, although each individual member of the court may be distinguished for some high qualification, the court, *qua* court, is not calculated to inspire the confidence which is placed in a court more homogeneous in its nature. As regards the Court of Exchequer, it is sufficient to say that it is looked upon as in a condition of pending change, which may be realised at any moment, by the retirement of its ablest members. Our only object in mentioning these matters is to impress upon the heads of the law the importance of putting in force the powers which already exist in the statute book, and creating others, if necessary, to insure that the full judicial strength shall be brought to bear upon the business in whatever court it is to be found. The Act of 1870, relating to Judge's jurisdiction (33 & 34 Vict. c. 6), simply says that the chief of any court *may request* the aid of a puisne Judge of another court. Something more than this is required. Everything in short points to the advantage to be gained by adopting Lord Hatherley's project of one Supreme Court. We can see no possible objection to going step by step into the process of law reform, and there could be no better commencement than the merger of the common law courts.—*The Law Times.*

The recent violent death of Mr. Justice Willes has called attention to the tendency among the more successful lawyers to excessive work. To "die in the harness" may be a very heroic ambition, but to die when only a portion of the labor of life is done—in the prime of life and in the midst of success, is something that no one contemplates with pleasure. And yet a large class of our successful lawyers are daily preparing for such a "taking-off," by ignoring every rule for the conservation of the life forces. No matter how strong and vigorous the constitution, incessant labor will sap its forces and prostrate its powers "ere half the tale of life is told." There is no necessity for this. The life of a lawyer is not essentially an unhealthy one, but he is apt to make it so by making it too sedentary and sluggish. The lawyer who will take an occasional day in the fields with gun and dog or fishing-rod, who will walk and ride and row, and who devotes seven or eight hours to sleep, will have a fair prospect, work he never so hard, of crowning his labors with the silver whiteness of years.—*Albany Law Journal.*

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

Pacaud v. McEwan.

Rescinding rule for new trial for nonpayment of costs.

The defendant had obtained a rule a year previously for a new trial on payment of costs. He neglected to pay the costs and the plaintiff obtained a rule *nisi* to rescind the rule for new trial. *Held*, that if the defendant should pay the costs of the trial, as provided by the original rule for new trial, and of this application within ten days, the rule *nisi* should be discharged, otherwise that the rule for new trial should be rescinded.

[Chambers, from Practice Court, 1872,—*Galt, J.*]

Burton, Q. C., obtained a rule calling upon the defendant to show cause why his rule for a new trial in this cause granted in Easter Term, 34 Vict., on payment of costs by the defendant, should not be rescinded on the ground that the defendant had made default in paying such costs. This rule was by consent of counsel enlarged to be argued in Chambers.

Osler shewed cause and called attention to the judgment of the Court of Queen's Bench, reported in 31 U. C. Q. B. 328, to show that the plaintiff was not under any circumstances entitled to recover more than nominal damages. The damages recovered were upwards of $800. It was admitted that he had no valid excuse to offer why the costs had not been paid; it was simply an oversight on part of defendant's attorney.

W. S. Smith supported this rule, citing *Grantham* v. *Powell* 1 P. R. 256; *Rabidon* v. *Harkin* 2 P. R. 129; *Van Every* v. *Drake* 3 P. R. 84; *Lyman* v. *Snarr* 3 P. R. 86.

Galt, J.—I should have been surprised to find that the decisions had so settled the practice in cases like the present that I should have been under the necessity of rescinding the rule for a new trial in this case and to have permitted the plaintiff to retain a verdict for a considerable sum of money, when the Court of Queen's Bench has decided that at the most he is entitled to nominal damages only. But on looking at the cases referred to by the learned counsel for the plaintiff I see that in every one of them the Court refused to rescind the original rule. Under the circumstances of this case I think the defendant should pay the costs of this application. I therefore order that upon the defendant paying the costs of the former trial, as provided by the original order for a new trial, and also the costs of this application, within ten days, that this rule shall be discharged, otherwise, that the same shall be made absolute.

COMMON LAW CHAMBERS.

Escott v. Escott.

Judge in Chambers—Setting aside final judgment—Filing affidavits on return of summons.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea.

Affidavits allowed to be read, though not filed when summons taken out; leave having been in fact given by the judge, but no notice thereof given to the opposite party.

[Chambers, 1872.—*Mr. Dalton.*]

Action against administrator on a note made by intestate. The plaintiff signed final judgment on default of plea. The defendant then applied to set aside this judgment on the merits, accounting for his laches.

O'Brien shewed cause. A judge in Chambers has no jurisdiction to set aside a final judgment, except when specially given him by statute, as in C. L. P. Act sec. 55: *Mearns* v. *G. T. R. Co.* 6 U. C. L. J. 62. See also *Ross* v. *Grange* 27 U. C. Q. B. 306 and C. S. U. C. c. 10. sec. 10. The application should be to stay proceedings: *Richmond* v. *Proctor* 3 U. C. L. J. 202. He also objected to certain affidavits being read as they were not filed when summons was taken out and no leave granted to file them on its return.

Keefer, contra.

Mr. Dalton.—I shall allow the affidavits to be read as leave was substantially given to the defendant to file further affidavits on the return of the summons. The neglect to notice it in the summons is a mistake on the defendant's part, and if it rendered necessary an enlargement by the plaintiff, it would probably be at the defendant's expense, and on such other terms as would prevent injustice to the plaintiff; but, as no inconvenience has arisen in this case, I should disregard the omission, or allow an amendment if necessary.

I think a judge in chambers has power to set aside on the merits a final judgment signed on default of plea. As I think the defendant has shown grounds sufficient, I shall make the order, and provide that the plaintiff may go to trial at next assizes.

Moffatt v. Evans.

(Reported by Mr. C. C. Robinson, *Student at Law.)*

34 Vict. cap. 12 sec. 12 (Ont.)—Service on Toronto Agent—Notice to plead.

A notice to plead when served on the Toronto Agent of a country attorney must demand a plea within ten days. A notice to plead which does not truly set out the time within which defendant must plead, before plaintiff can take his next step, is irregular.

The obscurity of the above enactment remarked upon.

[Chambers, Oct. 24, 1872.—*Mr. Dalton.*]

J. K. Kerr obtained a summons calling on the plaintiff, his attorney or agent, to shew cause why the notice to plead, served in this case, should not be set aside for irregularity, on the ground that the declaration and the notice to plead were served upon the Toronto agent of the defendant's attorney, and the defendant was therefore entitled to ten days to plead, instead of eight days, the time within which the notice served required the defendant to plead; and also to shew cause why the venue in this case should not be changed from the County of Wellington to the County of Halton.

Osler shewed cause. The summons as far as it relates to the notice to plead is grounded on 34 Vict. cap. 12, section 12 (Ont.) which reads as follows:—"In all cases where pleadings, or notices of trial, or countermand of notice of trial, in either of the Superior Courts of Common Law, or in the County Court, are served upon the agent of the attorney in the cause in Toronto, two clear additional days to the time now allowed by law for such service shall be allowed." Under this section it is not necessary in the notice to call upon defendants to plead within ten days. The statute does not apply to the form of the notice but merely to the time within which to plead. It is not enacted that ten days' notice is to be given, but that two days' time shall be added.

J. K. Kerr, contra. The section evidently means that two days are to be added to the time within which any pleading, &c., may be served, so as to avoid judgment by default. If the plaintiff were to give notice to plead in four days, it would clearly be irregular, and so as ten days are allowed, a notice only giving eight days is also irregular. The parties are entitled to a ten days notice, and this being only for eight days is irregular.

Mr. Dalton.—The language of sec. 12 of 34 Vict. cap. 12, is singularly inappropriate for the purpose intended. Every one is aware that the intention of the clause, as to pleadings, was to give the opposing party two clear days further time for his answer to any pleading, where it is served on the agent of the attorney in the cause at Toronto, beyond the time to which he would be entitled, had it been served directly upon the attorney himself. It needs such knowledge indeed, however derived, to find in the language used that such is the enactment. The words are: "Two clear additional days to the time now allowed by law for such service shall be added." Allowed to whom? and for what? It cannot be to the party pleading. A year is allowed by law for a party to declare, and for the pleadings after the declaration there is no limit whatever. It would be absurd then to think that two additional days are given to that party; and there is no use or purpose which can be supposed for the two additional days, unless they be added to the time which the opponent has to answer. To him they must be understood to be *allowed* as added to the time within which the party pleading can compel an answer to that pleading. The association of pleadings with notice of trial and notice of countermand argues this. But pleadings only are mentioned in the clause, which do not necessarily include notices to plead, reply, rejoin, &c. That has arisen doubtless from the common practice of serving the notice to answer with the pleading itself, which, however, is not necessarily nor always so. Then assuming that the *pleading* must be *served* ten days before you can compel an answer, it does not follow that the notice will be always subject to the same rule, but it must be where the pleading and notice are served together, for if the above construction be right, an answer cannot be compelled till ten days after the service of the pleading.

I at first thought that a notice served on the agent might be in the usual form of eight days, though ten days must be allowed to elapse after the service, before judgment could be signed; but I cannot, on consideration, escape from the conclusion, that at least the whole time allowed by law must be mentioned in the notice. For why is any time mentioned at all, unless it be the true time; the only purpose is to give information; it may be more than the time allowed by law, the effect of which would be to give such further time, but it cannot regularly be less. The service on the agent is good service, and the time mentioned in the notice must be reckoned from the time of such service. No other commencement can be supposed, and therefore to require the opponent to answer in eight days is to take from him the time which the statute gives.

I think then that the word "allowed" in the clause is used in the sense that the two days are to be added to the time which the opposite party has to answer, and that where the notice to answer is served, as here, with the pleading on the Toronto agent, the notice must be to answer in ten days.

Summons absolute.

CHANCERY CHAMBERS.

(Reported by T. Langton, M.A., *Barrister-at-Law.)*

Carr v. Moffat.

Practice—Demurrer—Order to amend—Bill not amended—Revivor.

A plaintiff submitted to a demurrer and obtained an order to amend, by which he was required to make the amendments within fourteen days. This he failed to do, but took out *ex parte* and served an order of Revivor, the demurring defendant having died after the expiration of the fourteen days.

Held that by his failure to amend within the time limited, the Plaintiff's right to amend was gone, unless by a special application, he obtained an order enlarging the time.

That the Bill was not by such failure to amend, out of Court, without a further order, but it was open to the defendant to move to dismiss.

That the plaintiff was not warranted, without notice to the defendant, in taking any further step in the cause before making the amendments, for which, in the first place, the Bill was preserved, and he could not, therefore, issue an *ex parte* order of revivor.

An application to set aside an order to revive for irregularity, is properly intituled in the abated suit, but if it be made upon any other ground the style of the cause as revived should be used.

An application to set aside an order of revivor should be made to the Court and not in Chambers.

Nicholson. v. *Peile*, 2 *Beav.* 497 not followed.

[January 4th, 1873.—*V. C. Blake*, on Appeal from Referee.]

On the 19th December 1872, an application was made to Mr. Holmested, the Referee in Chancery Chambers, by *Foster*, to set aside an order of revivor as irregular under the circumstances which appear in the judgment of V. C. Blake.

Foster cited *Hoflick* v. *Reynolds*, 30 L.J. (Chy.) 407, 9 W.R. 431. *Vernon* v. *Vernon*, 6 Chy. App. 833. *McMurray* v. *G. T. R.*, 3 Chy. Cham. 306.

Hodgins, contra, cited *Deeks* v. *Stanhope*, 1 Jur. N.S. 413; *Ward* v. *Cartwright*, 17 Jur. 781, 10 Ha. App. 73, and *Tarleton* v. *Barnes*, 2 Keen 632.

The Referee then refused the order asked. He thought that he was concluded by the decision of the late Referee in *Bell* v. *Cameron*, (5th Sept. 1872). There a demurrer was submitted to, and an order to amend taken out; the plaintiff did not amend under it, but took out another order after the time for amending under the former one had expired. This was moved against, and Mr. Taylor, the late Referee, then held that the Bill was not out of Court, and it was competent to the plaintiff to take out as many orders as he pleased, subject to the interference of the Court, to prevent abuse of its process. The present application being made in the abated suit, objection was taken to the style of cause. Mr. Holmested was of the opinion that an order of revivor was *de facto* good, and even proceedings to discharge it should be styled in accordance with it. He also doubted whether under order 339 the application should not be made to the Court, even though the ground laid was irregularity, but upon the main grounds he refused the order.

Against this decision the defendant appealed. The case was argued by the same counsel, and judgment was delivered by :—

V. C. Blake.—This is an appeal from an order of the Referee in Chambers refusing an application of Alexander Moffatt the younger, to discharge an order whereby this suit was revived against him and William Moffatt as defendants. It appears that the Bill was filed against Alexander Moffatt on the 15th Nov. 1871; a demurrer to this bill was filed on the 4th March 1872, an order to amend was taken out on the 13th of the same month, the defendant died on the 8th April following, and on the 2nd of December last, the cause was revived against W. Moffatt and Alex. Moffatt the younger as representing the original defendant. This order was served on Alex. Moffatt the younger on the 6th Dec., the motion to discharge the same was served on the 16th, and an order was made by the Referee refusing this application on the 19th of the same month.

The applicant asks for the discharge of the order to revive on two grounds; 1st, because at the time of the granting of this order the cause was out of Court as the plaintiff had not amended pursuant to the order to amend; and 2nd, because, even if the cause were in Court, the plaintiff was not in a position to take such a step *ex parte*, as the reviving the suit. The order to amend taken out reads as follows: "upon the application of the plaintiff it is "ordered that he be at liberty to amend his bill "of complaint in this cause as he may be advised "without costs, amending the defendant's office "copy thereof, submitting to the demurrer of the "defendant herein and paying to him four dollars "for his costs hereof, and making such amend-"ments within fourteen days from this date." Looking at the form of this order, it cannot be successfully contended under the authorities that the Bill is without further order gone. It would certainly be necessary to procure an order based upon the non-fulfilment of the terms of the order to amend before the bill could be considered out of Court, and as this has not been done, I think the first ground of exception cannot succeed. As to the second

point, my impression at the hearing of the motion was, and after further consideration, still remains, that the plaintiff submitting to a demurrer and obtaining leave to amend, is bound within fourteen days to act under the order, or else his right to amend is gone. He is bound either to amend within fourteen days, or to make an application to extend the time for such amendment; but failing this, the defendant can move to dismiss. From the cases of *Armitsted* v. *Durham*, 11 Beav. 428 and *Bainbrigge* v. *Baddeley*, 12 Beav. 152, it is clear that where an order to amend issues without limiting the time when such amendment is to be made, whether the order issue before or after answer, or demurrer upon an ordinary or special application, the Bill must under such order be amended within fourteen days, this being so when the defendant pleads in such a way as that the plaintiff is obliged to admit his bill is defective, and the Court allows him to make a better case by his pleading. I do not think it is unreasonable to say that unless the necessary amendments be made within fourteen days, or by special application, the time for amendment be enlarged, the bill shall stand dismissed. It is true there are two cases, *Nicholson* v. *Peile*, 2 Beav. 497, and *Deeks* v. *Stanhope*, 1 Jur. N. S. 413 which go to shew that before answer and after demurrer submitted to, and leave to amend given, the plaintiff can issue as many orders to amend as he pleases, the result being that a plaintiff can continue to issue orders to amend and delay the proceedings until the defendant, by a special application, procures from the Court, some order limiting the time within which such amendment is to be made. But it is to be observed that Lord Langdale who gave judgment in the three cases cited from Beaven, says in disposing of *Bainbrigge* v. *Baddeley*, "I certainly was of opinion that if upon the "allowance of a demurrer, more than ordinary "time to amend was required, it ought to be "asked for, the plaintiff might either have "applied specially to extend the time, or for a "special order to amend, but the order of "course was irregular." The force of *Nicholson* v. *Peile* is thus weakened, as it is also by the case of *Vernon* v. *Vernon*, 6 Chy. App. 833, where it is cited but not followed. In *Hoflick* v. *Reynolds*, 9 W. R. 431, V. C. Kindersley after referring to two of the Registrars and two of the Clerks in Court said, "the view they had "taken appeared to be the sound one, and it "was this, when the order for leave to amend "was obtained that had the effect of getting "rid of the Bill as it then stood, and unless the "plaintiff amended within the time pre-"scribed by the order, the bill was gone." In *Vernon* v. *Vernon*, a demurrer having been filed to a bill the plaintiff in due time served an order of course for leave to amend. Two days before the expiration of the time for amending, he served a summons for further time to amend, returnable the day after such expiration, which application was refused by V. C. Bacon. The plaintiff appealed to the Lords Justices from this decision and it was upheld. There the Court could have granted the request of the plaintiff either by extending the time under the order already made, or by issuing a fresh order to amend, and if the Court approved of *Nicholson* v. *Peile*, the latter course would have been followed, but in place of that, the Court of Appeals virtually over-rules that decision. I think therefore, that I am justified by the authorities, as they stand at present, in the conclusion that under the circumstances of this case apart from the peculiar terms of the order to amend, that the plaintiff was bound to amend within fourteen days from the date of the order, and that after the expiration of that time, the plaintiff was put to make a special application to the Court for any indulgence he might think himself entitled to. I think therefore, he was not justified in taking out an *ex parte* order to revive, but that not having taken advantage of the order to amend within fourteen days, he was put to make a special application to Court for an order to revive. The bill was preserved for one specific purpose, and a specified time was appointed for carrying that out; the plaintiff accepted these terms, and it is not for him to say further time must be given, and the suit kept alive for all the purposes I desire, and I will proceed without calling upon the defendant to shew cause. If my view of the practice be correct, as against the original defendant at the time of his death, the plaintiff could not have taken any step except by a special application, and I cannot see that the death of the defendant can place the plaintiff in any better position in this respect. But the terms of the order in this case put another difficulty in the plaintiff's way. It gives him liberty to amend on certain terms, amongst which are submitting to the demurrer, and making the amendments within fourteen days. These are the conditions upon which the indulgence asked for is granted. He is to be at liberty to amend, if he submit to the demurrer, and if he amend within fourteen days. Now, under Order 196, where a person obtains an order upon condition, and fails to comply with the condition, he is considered

to have abandoned the order so far as the same is beneficial to himself, and any party interested may take such proceedings as the order may in such case warrant, or as might have been taken if the order had not been made. Here the condition was not complied with, and I do not think the plaintiff can by an *ex parte* order revive the litigation, but I am of opinion he must make a special application for such order, as under the circumstances the Court may consider him entitled to. On the part of the plaintiff, it was argued that in any event this application cannot succeed, because the notice of motion is styled in the original cause, and not in the cause as revived. I think the plaintiff might have used the style as revived. Order 338 says, "an office copy of the order is "to be served upon the party or parties who "would be defendant or defendants to a bill of "revivor, or supplemental bill according to the "former practice of the Court, and such order "shall from the time of service, be binding up- "on such parties." The persons added seem from the first to be looked upon as parties. The order to revive is a conditional one to go absolutely into effect, unless cause be shewn. The persons added are to be treated and named as parties from the time the order names them, unless they take proceedings to have their names struck out. The practice under the similar Order in England shews that this view is correct, for it treats such a case as the present (a motion to discharge the order to revive for irregularity), as an exception to what would be the ordinary rule as to the style of the cause. In 2 Dan. Chy. Pr. 1389 (5th ed.) the rule is laid down as follows, "If the order is sought to "be discharged on the ground of irregularity, "the notice of motion is properly entitled in "the abated suit only," citing *Stratford* v. *Baker*, L. R. 4 Eq. 256, which is an authority that supports this statement. As the present application is one to discharge for irregularity the order to revive, it comes within the above exception, and therefore the plaintiff was justified in using the style he did. On the part of the plaintiff, it was further urged that the application should have been made to the Court, and the Referee has no jurisdiction. Upon this objection, I think the plaintiff is entitled to succeed. The order to revive under the present practice takes the place of the order formerly made, not in Chambers, but in Court. The person served is to be at liberty to apply to the "Court" for the discharge of the order. The questions arising in cases of abatement are oftentimes quite as difficult of solution as those occurring in the Master's office, where parties are added. In the latter case, the Master exercises his discretion, and from his order the appeal must be to the Court In the former case, the Clerk of Records and Writs grants the order, and I do not think unless express power is given by the orders of the Court, or the practice warrants it, that such an application as the present can be made, except in Court. No authority was cited on this point in support of this application, and I have not been able to find any. Under the act appointing the Referee his power in Chambers is restricted, and he has no authority "in matters relating to appeals and applications in the nature of appeals." I think the present motion comes within the exception, and that the Referee has not the power to review what the Clerk of Records and Writs has done in this case, and therefore on this ground, that the order of the Referee should stand, and the present application be refused. I was asked not to charge the applicants with the costs of these motions. In every matter I think the costs should follow the event, unless some very good cause for a different result be shewn. I cannot say here that this has been done. There is no sufficient reason for charging the plaintiff with his costs of a motion in which he has succeeded, and I think he should have them against the defendant who moves.

Order affirmed.

Fullerton v. Keely.

Gen. Orders 434 and 435—Infants—Decree in Chambers—Setting down.

In suits for foreclosure or sale, motion for a decree is to be made in Chambers under Order 434, only when infants alone are concerned. If there be also adult defendants, the case should be regularly set down for hearing before the Court.

[January 20, 1873.—*Mr. Holmested.*]

Fleming applied in chambers for a decree under Order 434. Besides the infants there were adult defendants against whom the bill had been taken *pro confesso*.

The Referee.—This is an application which it is not within my jurisdiction to entertain. A case of *Lloyd* v. *Burke*, which was very similar to the present in its facts, was set down (29 Nov. 1872) by way of motion for decree, and His Lordship Vice Chancellor Strong held that it was properly so set down. He pointed out that Gen. Order 435 empowers the Registrar to issue a decree against adult defendants, under certain circumstances, but gives him no jurisdiction where infants are concerned. Such jurisdiction is given to the Referee in Chambers by Gen.

Order 434, but the terms of this order are such as to give him no power to make a decree against adults. So that in a case like the present where the combined action of the Registrar and the Referee would be necessary, the proper course would be to set the cause down on motion to the Court. [This course was afterwards followed.]

MASTER'S OFFICE.

(Reported by T. Langton, M.A., *Barrister-at-Law.)*

Keim v. Yeagley.

Practice—Taxation—Revision of Bills taxed by Local Masters—Powers of Taxing Officer at Toronto—Evidence.

The Taxing Officer on revision of bills of costs taxed by a Local Master has power under Gen. Orders 311 and 312 not only to strike out items improperly allowed but also to restore items improperly struck out and generally to review the taxation.

Evidence cannot be received by a Taxing Officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction.

[Master's Office, January 14th, 1873.—*Mr. Taylor.*]

This was an appeal from the decision of the Taxing Officer.

C. Moss for plaintiff.

W. Cassels for defendants.

Master Taylor—It seems to me that the power of the taxing officer over bills of costs before him under Gen. Orders 311 and 312 is not limited to striking off items which he may find have been improperly allowed. It is that in the Order of February, 1865, the reason for passing the Order now in force as to the revision of taxation is said to be that the Judges have observed in bills of costs, numerous items allowed by Local Masters which are not warranted by the tariff, "and also that Order 312 directs the taxing officer to mark in the margin, such sums "(if any) as may appear to him to have been improperly allowed or to be questionable, and "this is relied on here as an argument that the "taxing officer cannot restore any items taken "off by the Local Master, but can only strike "off items which he has improperly allowed. The order, however, goes further and says the taxing officer is to revise the taxation. Now the definition of the word revise as given in the Imperial Dictionary is, "To review, alter and "amend," so that the direction to revise the taxation is wide enough to cover what has been done by the taxing officer here. The provision for giving notice to the Toronto agent in all cases where the taxation is not clearly erroneous is one applying equally where the alteration intended to be made is by striking off or by restoring. The other question is whether the taxing officer should have received evidence to show that the defendant is not entitled to the items in respect of which the contention has arisen. The plaintiff desires to show that the order changing the venue was obtained by the defendant for his own convenience and under an arrangement with the plaintiff that such order should be obtained at the defendant's own expense. Would such evidence have been admissible before the Local Master? I incline to think it would not. The order is one obtained by the defendant on consent of the plaintiff and is silent as to the costs. This being the case under the third rule laid down in 1 S. & S. 357, the costs of both parties became costs in the cause, and the plaintiff having dismissed his own bill with costs, the defendant gets the costs of the cause and is entitled to the costs of the order. The Master could not, it seems to me, receive any evidence to show that the defendant is not entitled to costs which the order considered according to the long established practice of the Court gives him. Had it been intended that the defendant should not in any event have the costs, the order should have been so expressed. The order is on the face of it a consent one, and this is another difficulty in the way of any change or variation being now made in it. In connection with the first point disposed of, namely, the extent of the Taxing Officer's powers on a revision of taxation, it is worthy of observation that at the time the orders of February, 1865, were passed there was an order in force (28th April, 1862) made, under which any person against whom costs had been taxed by a Local Master could obtain an order of course for retaxation in Toronto. This order has not been in force since the Consolidation of the General Orders in June, 1868. On a taxation under that order the whole bill was opened before the Taxing Officer. Orders 311 and 312 in fact require that every bill of costs taxed by a Local Master shall undergo that scrutiny by an officer of the Court in Toronto to which formerly only particular bills were subjected on the application of a party aggrieved. Where a party feels aggrieved by the improper reduction of his bill of costs by a Local Master he has no redress except by the expensive proceeding of a special petition to the Court unless he can obtain, as I think he can, redress under Order 312. To hold that he can do so when the bill is before the Taxing Master for review is, it seems to me, more consonant with the principles which govern as to proceedings in the Court, than to hold that he must resort to the expensive mode of proceeding by a special petition.

NOVA SCOTIA.

SUPREME COURT.

Bowen and Wife v. Shears.

Trespass to land—Statute of limitations—Adverse possession—Estoppel.

In 1831, C. gave plaintiff's wife a piece of land, part of a farm. In 1833 the plaintiffs went into actual possession, C. helping them to build the house, and so continued until 1870, when defendant entered. Plaintiffs brought trespass, and defendant set up title in himself under the will of C. (made in 1859), by which the farm, "then owned and occupied by the testator," was devised to the defendant. In 1838 the plaintiffs conveyed to C. in trust, to preserve the right title and interest of plaintiff's wife for their daughter, free from the father's debts, &c., the rents and profits to the wife during her life, and after her death for the support and maintenance of the daughter. By this deed C. had power to call for and receive the rents and profits. Before his death C. recognized in a survey he made the fact that he had given the land in dispute to plaintiff's wife.

Held that although the plaintiffs were estopped by the deed made in 1838 from claiming title by possession before that time, they were entitled so to claim, being in effect, a tenant at will, after the lapse of one year from that date; and the plaintiffs could maintain their action against defendant as a wrongdoer, having held adversely to him for more than twenty years.

Trespass by Bowen and wife against Philip Shears. At the trial of the cause a verdict was taken by consent for the plaintiffs for $4.00—damages subject to the opinion of the Court on the whole case with all the powers that could be exercised by a jury, and power also to set aside the verdict or give judgment in accordance with it, or to order a nonsuit or judgment for defendant.

The facts of the case as proved at the trial were substantially as follows: The plaintiffs were married in 1831, and the day after the marriage Philip Cheppard, the godfather of the plaintiff Mary Ann Bowen and for whom she had previously worked, took her to the piece of land now in dispute, and said, "I am going to give you this." It was then called pasture and had a fence round it. He divided the land between her and her brother, the present defendant, giving to her one half, between five and six acres. In 1833 the plaintiffs went into possession of the land thus made over to the wife Mary Ann, and continued in quiet possession of it until the trespass complained of by the defendant in April 1870, showing a continuous possession of thirty-seven years. The plaintiff Edward Bowen built a house on the land, urged to do so by Cheppard, who helped him to build the cellar, and the plaintiffs went into the house in 1834, and occupied it from that time until five years before the trial, when they rented it at £9 a year. The defendant Shears helped to shingle the house, and two years afterwards assisted to erect the barn, and since then there has been a fence round the property and the whole now under cultivation. The trespass by the defendant was proved. His defence under his plea was title in himself. This he claimed under the will of Philip Cheppard, who, by a will dated 29 Nov. 1859, devised to him all the farm lot that the testator then owned and occupied containing about 400 acres with the buildings, &c., excepting out of the said devise, about 2½ acres. To hold to the said defendant the said lot and premises during his natural life, and after his decease to his daughter Mary Shears in fee simple. When the testator made his will he had been out of that part of the property claimed by the defendant under the devise to him of the 400 acres for a period of 28 or 29 years, unless, under the conveyances to which hereafter referred to, he became revested of the property given to the plaintiff's wife in 1831. This deed, dated 26th Oct. 1838, was proved on the part of the defence to be between the plaintiffs on the one part, and Philip Shears on the other. It recited, that "Whereas Philip Cheppard has allowed Edward Bowen to erect a dwelling house and barn on a piece of land belonging to him, and whereas the said Edward Bowen and Mary Ann his wife are anxious that the said premises should be conveyed to the said Philip Cheppard in trust for the benefit of Eliza Jane Bowen: they, the said Edward Bowen and Mary Ann his wife for divers good causes, &c., and in further consideration of the sum of ten shillings, &c., granted, bargained, &c., to the said Philip Cheppard, his heirs and assigns, all the estate right title and interest whatever of the said Edward Bowen and Mary Ann Bowen both at law and in equity of, in to or upon the said premises. To have and to hold to the said Philip Cheppard his heirs, &c., but to for and upon the uses and trusts to be specified and declared by a certain Indenture of even date therewith and thereto annexed. The deed also assigned to Philip Cheppard certain personal property to and upon the same uses and trusts as are mentioned in the conveyance already referred to. That conveyance commenced with stating "that the right title and interest of the said Mary Ann Bowen in the house and barn erected on the land belonging to the said Philip Cheppard, shall be preserved for Eliza Jane Bowen, daughter of the said Edward and Mary Ann Bowen, exempt from any liability of the debts,

&c., of the said Edward Bowen." Then follows a covenant between the present plaintiffs and Philip Cheppard that he shall have full power and authority to call for and receive the rents and profits of the said house and barn, and then a further covenant on the part of Philip Cheppard acknowledging, testifying, and declaring that the uses and trusts upon which the first conveyance was executed were and are that the said house and barn and all rents and profits arising therefrom shall be paid to the said Mary Ann Bowen during her lifetime, and independent of her said husband, and after her death be applied towards the maintenance and support of the said Eliza Jane Bowen, &c.

Dodd, J.—Whatever claims or title plaintiff, have under the gift of Cheppard to Mary Ann Bowen in 1831, they are estopped from setting it up by their deed to him in October 1838. But from that time to the trespass complained of, they have been in the undisputed possession of the property enclosed by a stone and wood ence, and recognized by Cheppard at a survey of his land by Campbell, who when they came to the 5 acre lot, did not include it in the survey, Cheppard telling the Surveyor that was the lot he had given to Mary Ann Bowen; when Cheppard died not appear, and under the devise in his will to the defendant, the latter did not attempt to dispute the possession of the plaintiffs until April, 1870. The deed of 1838 to Cheppard, from the plaintiffs, made them tenants at will, and at the expiration of one year from that date, the possession become adverse. The first section of the Act of 1866 enacts that no land or rent can be recovered, but within twenty years after the right of action accrued to the claimant, or some person whose estate he claims. By sec. 3, in the case of a tenant at will, the right shall be deemed to have accrued at the end of one year from its commencement. The right in this case under the statute for Cheppard to recover the land commenced in October 1839, and in October 1859 he would be excluded from recovering or maintaining the action, and the defendant who claims through him, cannot be in a better position. The plaintiffs have held adversely against this testator and the defendant over thirty-one years. The Act 3 & 4 Will. IV. c. 27, the provisions of which are similar to the Provincial Act of 1866, sections 2 & 3, has done away with the doctrine of non-adverse possession, and the question now is whether twenty years have elapsed since the right accrued, whatever the nature of the possession. Except in the cases mentioned in sec. 15 of the Act, which do not apply to the case under consideration, the effect of the Act is not merely to bar the remedy, but to bind and transfer the estate, *Scott* v., 3 Dan. & War, 388, *Nepean* v. *Doe*, 2, M. & W. 894, *Cullen* v. *Doe* 11 Ad. & E. 1008. The possession in this case is ample to maintain the action against the defendant, who is a wrong-doer. I therefore think the verdict for the plaintiff, taken by consent, for $4, should remain, and that the plaintiffs should have the costs of the argument.

IRISH REPORTS.

COURT OF COMMON PLEAS.

Loughnan *v.* Barry and Byrne.

June 3, 4, 24, 1872.—*Sale of Goods—Fraudulent misrepresentation—Payment by unproductive cheque—Rescision of contract—Trover—Money had and received.*

It is not necessary that a fraud by the vendee of chattels should be indictable, in order to entitle the vendor to rescind the contract of sale by reason thereof.

The drawing and giving of a cheque upon a bank, in payment, amounts to an implied representation that the drawer has authority to draw upon the bank, against assets *eo instanti* applicable towards payment.

The giving of an unproductive cheque in payment, on a sale of chattels for ready money, by a vendee, then knowing there are no assets in bank against which he has authority to draw, at the time of the cheque being taken by the vendor upon the faith that there are immediate funds applicable towards payment, amounts to a fraudulent misrepresentation by the vendee; and such misrepresentation will entitle the vendor to rescind the contract and resume the goods, notwithstanding that the vendee, upon reasonable grounds believes, at the time, that there would be funds in bank to pay the cheque when presented, and though he were not indictable for obtaining the goods by false pretences.

[C. P.—Ir. L. T. Rep. Dec. 21, 1872, p. 186.]

This was an action of trover, and for money had and received. The facts, as proved at a former trial, have been already reported, 5 Ir. L. T. R. 189. A new trial was had at the sittings after Michaelmas Term, 1871. Substantially the same facts then appeared, which, for the purposes of this report, are sufficiently set forth in the judgment (*infra* p. 64) of the Lord Chief Justice. At the close of the plaintiff's case, *Heron*, Q.C. (with him *Hemphill*, Q.C., and *Martin*), on behalf of the defendant, asked his lordship for a non-suit, or to leave to the jury the questions: 1. Did Neill intend to cheat? 2. Did he believe the cheque would be paid? Referring to the above report, and to *R.* v. *Walne*, 11 c. c. c. 647 there cited, they contended that the question of Neill's intention should be considered by the jury. That so, where the question is whether a

person quitting his house thereby commits an act of bankruptcy, his intention in quitting is to be considered.* That the question of Neill's intention to pay should also be left to the jury; *Hawse* v. *Crowe*, R. & M. 414. And that, in order to vitiate the contract, the facts must have amounted to the offence of obtaining the goods by false pretences; referring to *Noble* v. *Adams*, 2 March, 370; Holt 251, where it is said, "unless the representations amounted to the offence of obtaining goods by false pretences, we cannot take upon ourselves to say that the contract was altogether void,"† *Armstrong*, Sergeant (with him *Monahan*, Q.C., and *H. H. Maddermot*), *contra*, submitted that the first question was objectionable, as involving mixed matters of law and fact, and that the second was *dehors* the question at issue; relying on the decision of the Court above *Loughnan* v. *Berry*, 5 Ir. L. T. R. 189, and referring to the notes thereto. His Lordship declined to non-suit, or to leave to the jury the question specified. The defendants having accordingly gone into evidence, at the close, *Hemphill*, Q.C., asked his Lordship to leave to the jury the questions:—1. When Neill gave the cheque, did he believe it would be duly honoured on the following day? 2. Did he give the cheque with any intention to defraud the plaintiff?

Monahan, C. J.—I cannot do so. At the furthest, I could only ask had he reasonable grounds for believing that the cheque would be honoured. The second question is unnecessary. I am clearly of opinion that there may be a misrepresentation such as would render the contract voidable, although the facts do not amount to the offence of obtaining the goods under false pretences.

Hemphill, Q.C., asked for a direction that, in case the jury believed that Neill gave the cheque without any intention to defraud, and believing that it would be honoured on the following day, they should find for the defendants: *Bristol* v. *Winsmore*, 1 B. & C. 514. Also, for a direction on the money count, as there was no privity between the plaintiff and defendants: *Baron* v. *Husband*, 4 B. & Ad. 612; and upon the ground, that as the defendants would have had no right to keep the money if demanded by Neill on April 14th, unless Neill owed them money, the defendants were entitled to retain the moneys of their debtor on that day. And further, that, the plaintiff having done no act to disaffirm the sale to Neill before the re-sale of the cattle, the defendants were entitled to a verdict, even though the goods were obtained by fraud on the part of Neill: *Kingsford* v. *Merry*, 11 Ex. 577, 1 H. & N. 503.

Monahan, C. J.—I must decline to direct as required. There may be legal fraud, without an intention to defraud. I think that ordinarily, and having regard to the course of mercantile dealings, a person who, knowing that there are no funds to meet it, gives a cheque to another, who takes it believing that there are such funds, thereby impliedly represents and undertakes that there then are funds to meet it in the bank on which it was drawn. If its payment is to be deferred, or to depend upon a contingency, the person giving the cheque ought to mention that at the time.

His Lordship having charged the jury, left to them the following questions:—

1. When Neill gave the cheque to the plaintiff, did he in effect convey to him that that there were funds in the bank to meet the amount thereof, knowing that there were not funds to meet it; and did the plaintiff take the cheque, believing that there were funds in bank to pay the same, on the faith of such representation?

2. At the time of giving the cheque, had Neill a reasonable ground for believing, and did he in fact believe that there would be funds in the bank to pay same when presented?

3. When the defendants sold the cattle, were they aware of the circumstances under which Neill had bought the cattle, and that the cheque was passed by him by the way of payment therefor, and that there were no funds for the payment thereof except the proceeds of the sale of the cattle by the defendants?

The jury having answered these questions respectively in the affirmative, counsel for the defendants called upon his Lordship to direct a verdict for them upon the second finding, which the learned Judge declined to do; but, on the requisition of the plaintiff's counsel, directed a verdict for the plaintiff, reserving leave, by con-

*See *Fowler* v. *Padgett*, 7 T. R. 509.—Rep.

† The judgment of the Court was delivered by Gibbs, C. J., "one of the most learned and acute judges that ever sat in Westminster Hall" (*per* Lord Tenterden, 2 B. & Ad. 697). The expressions in the text do not occur in the report given in 7 Taunt. 58 (misquoted in Chitty, Cont. 9th, Ed. 379), but appear in the reports of Marshall and of Holt ("a book of no authority," *per* Lee, C. J., 1 Wils. 15). But, whatever the value of the latter reporters, their concurrence is demonstrative of accuracy in this particular case (*cf.*, *per* Lord Mansfield, Cowp. 16); and their reports of it are abundantly confirmed by *Irving* v. *Motley*, 7 Bing. 543. In the latter case, however, Park, J., materially qualifies the inference to which *Nobles* v. *Adams* might have given rise. See also, Benjamin on Sales, 323. With respect to *Irving* v. *Motley*, it may be noted that the report in 5 M. & P. 393 omits a *dictum*, of Tindal, C. J., which appears in Bing.—Rep.

sent, for the defendants to move to have the verdict set aside and a verdict entered for them, if the Court should be of opinion that a verdict should have been so directed.

A conditional order having been obtained, "that the verdict had for the plaintiff be set aside, and a verdict entered for the defendants, pursuant to leave reserved, or that said verdict be set aside and a new trial granted on the ground of misdirection."

Monahan, Q.C., (with him *H. H. Macdermot*), on behalf of the plaintiff, showed cause. The doctrine of *Kingsford* v. *Merry*, 1 H. & N. 503, 11 Ex. 577, does not protect the defendants, for firstly, they were not purchasers or innocent transferees, but the salemasters of Neill; and secondly, they had full notice and knowledge of the transaction with him. A cheque is an order for the payment of money: and its nature assumes that there is cash in bank to meet it on the moment of its being passed: *Lockett's Case*, Leach C. C. 94, 6 T. R. 567, n., 2 E. P. C. 940; 2 Russ. on Cr., 4th ed., 640, n. a. The passing of it, therefore, is equivalent to a representation of there being immediate funds at the bank applicable to its payment: *R.* v. *Parker*, 8 C. & P. 831; *R.* v. *Jackson*, 3 Comp. 370. On the first finding, Neill was guilty of legal fraud; and the second finding is not inconsistent, even if upon it he would not have been guilty of criminal fraud.* But even in a criminal point of view, the offence of obtaining goods by false pretences might exist without an intention in fact to defraud: *Re Naylor*, L. R. 1 C. C. R. 4. [MORRIS, J.—Is there any statement there, that Naylor had reasonable grounds for believing that Moss would take the goods?] None; but the jury find that, at the time of the pretence, Naylor intended to pay for the goods. That case shows that a pre-conceived design to get the goods without payment was unnecessary. The contrary was contended for on the former argument of this case. There is only a short report in the Irish Reports, but the arguments are fully and accurately stated in 5 Ir. L. T. Reports, 189. [MORRIS, J.—In the absence of any conversation or statement to the contrary at the time of a sale, it appears to me that the giving of a cheque in payment would be equivalent to a ready-money transaction. But the purchaser could not be indicted, if he had reasonable grounds for believing that it would be met.†] The transaction was a ready-money one, and there is no evidence that the cheque was taken otherwise than as ready money. Fraud may vitiate a sale, though it do not amount to a criminal offence. Falsehood in fact, going to the substance of the consideration, gives a right to rescind the contract: *Reese River Co.* v. *Smith*, L. R. 4 E. & Ir. App., 79. [MORRIS, J.—Suppose that Neill had himself retained the cattle, would the plaintiff be justified in retaking them from him? My present impression is that he would*]. Neill would have had no answer to an action of trover.† The defendants were Neill's agents, and as such liable: *Perkins* v. *Smith*,‡ 1 Wils. 328. Not being innocent transferees without notice, they are not entitled to protection: *Irving* v. *Motley*, 7 Bing 543. The sale to Neill being vitiated by fraud, no property passed: *Noble* v. *Adams*, 7 Taunt. 59; and the defendants, having got possession of the goods and the proceeds, are liable to the true owner in trover and for money had and received:§ *Hill* v. *Perrott*, 3 Taunt. 274; *Abbotts* v. *Barry*, 5 Moore 98, 2 Br. & B. 369. It is not necessary to show that an action of deceit would lie against

* So, see *Foster* v. *Charles*, 7 Bing. 105. See note, 5 Ir. L. T. R., 191.—REP.

† In a recent case in Australia, a prisoner was indicted for obtaining money by a false pretense that a cheque was good and available, and would be paid when presented at the bank. It was post-dated and crossed; but was not presented through a banker; and before the day of post-date, the traverser was arrested, and thereby, as contended, prevented from earning money to meet it. He had previously had an account in the bank, but only a nominal sum remained to his credit. *R.* v. *Parker*, 2 Moo. C. C., 1, was cited. Held, that there was an existing false pretense, *i.e.*, that the cheque was a good one: —"It was not necessary to accompany the cheque by a guarantee of the solvency of the drawer, or to the effect that money would be at the bank to meet it. A cheque represented money, and bore on the face of it an implied statement that the drawer had authority to draw upon the bank—that he had funds at the bank, a portion of which he could withdraw. A post-dated cheque [see *Watson* v. *Poulson*, 15 Jur. 1111—*R.*] in this respect differed in no way from one dated the day it was given. The question then was, when the prisoner gave this cheque, had he any funds to meet it, or had he any reasonable expectation of having funds:" *R.* v. *Bathurst*, 1 A. J. R., 40.—REP.

* A having bought goods from B, with a pre-conceived design not to pay, but with a view of obtaining money on them by giving a bill of sale; and having misrepresented his ability to pay: Held, that B was justified in rescinding the contract and re-taking the goods: *Dixon* v. *Heweston*, 16 L. T. N. S., 295. See *Gillard* v. *Brittain*, 8 M. & W., 575; *Clough* v. *L. & N. W. Ry.*, L. R. 7, Ex. 34; *Nickling* v. *Heaps*, 21 L. T., N. S. 754; *Harvey* v. *Mayne*, 6 Ir. L. T. R. 130, and notes thereto.—REP.

† If the facts amounted to felony, see *Wells* v. *Abraham*, L. R. 7 Q. B. 554, 41 L. J., Q. B. 306, 26 L. T., N. S. 433; *Desborough* v. *Homes*, 1 F. & F. 6.—REP.

‡ See *Fowler* v. *Hollins*, L. R. 7 Q. B. 616.—REP.

§ See *British* v. *Amer. Telegraph Co.* v. *Albion Bank*, L. R. 7 Ex. 122; and note to 5 Ir. L. T. R. 192.—REP.

Neill. The intention to defraud is a more essential element in deceit.* But in contract, by reason of the false representation, that which was contracted for not being acquired, there is in effect no contract: Kerr on Fraud, 17. So here, that which was in fact given to the plaintiff differed in the substance from what he was entitled to receive: *Gompertz* v. *Bartlett*, 2 E. & B. 849. And therefore, even if deceit would not lie, the sale would be void: *Polhill* v. *Walter*,† 3 B. & Ad. 114; *Milne* v. *Marwood*, 15 C. B. 778. No matter how reasonable may have been Neill's expectation of funds, according to the second finding, that does not acquit him of the misrepresentation with which he stands charged by the first finding. The last finding establishes that the defendants are not in the position of innocent third persons. But, even if one or two innocent persons must suffer, it should be he who provided the means by which a wrong was compassed.‡

Hemphill, Q.C., (with him *Martin*,) for the defendants, contra. On the second finding, a verdict should be entered for the defendants. We have now had new evidence as to the dealings between Neill and the Royal Bank; and it appears that the bank frequently met his overdrafts, exceeding the defendants' guarantee. [MONAHAN, C. J.—It was not suggested, at the trial, that the bank of itself would pay this cheque. No question was left to the jury as to that.] It shows that Neill was not criminally liable. He went to the fair with some hundreds of pounds in cash, to purchase cattle. He bought those cattle (amongst others), intending to pay for same, and appointing a place and time to do so. That was a complete sale, a sale upon credit. The sale transferred the property, and the right of property carried with it the right of possession. Before the time for payment had arrived, the possession was vested in the vendee by delivery of the cattle under the contract. The lien of the vendor was at an end, and his right of stoppage *in transitu* determined; nothing remained but his right to recover the price on foot of the contract: *Dixon* v. *Yates*, 5 B. & Ad. 313. The plaintiff could not then have re-taken the cattle, and he was bound by the terms of the credit he had given. Subsequently at one o'clock, as appointed, the parties met for payment, and the plaintiff, without question, accepted 30s. earnest and a cheque for the residue of the purchase money, and a cheque which could not possibly be presented and cashed on that day. [MONAHAN, C. J.—The plaintiff being to be paid in cash, could he have rejected the cheque when tendered, and have re-taken the cattle? LAWSON, J.—The cattle had not been delivered to Neill then.] Whether the plaintiff could have resumed possession, depends on whether the bargain and sale had been completed, the property divested, and the transitus at an end. If the transaction, in its inception, had been vitiated by fraud, and possession had not been given up, the vendee would not have been discharged:* *Owenson* v. *Morse*, 7 T. R. 64. But here, there was the previous design to pay; the acceptance of 30s. part payment, † which of itself would have prevented the plaintiff from following the cattle as against Neill, the transitus being determined; and the delivery of the cattle. Neill had desired that the cattle should be sent to the railway, and the report of the learned Judge states the evidence of the plaintiff, that his "men drove the cattle to the railway station, where they left them for Neill; where they remained till evening, and were then forwarded by cattle train to Dublin." If Neill had re-sold the cattle at the fair, the plaintiff could not have taken possession from the sub-purchaser,‡ the property having passed to Neill by the delivery without demanding the price: *Haswell* v. *Hunt*, 5 T. R. 231; *Milwood* v. *Forbes*, 4 Esp. 173. In order to prevent the property passing, there must have been a pre-conceived design to defraud: *Earl of Bristol* v. *Willsmore*, 1 B. & C. 514. The question is, what was the intention of the purchaser? *Stephenson* v. *Hart*,§ 4 Bing. 476. The passing of a cheque which there are no funds to meet

* See Hammond N. P. 283; *Watson* v. *Poulson*, 15 Jur. 1111.—REP.

† See *Watson* v. *Poulson*, 15 Jur. 1111, 1 C. M. & H. 540.—REP.

‡ So, see *Fowler* v. *Hollins*, (Ex. Ch.) L. R. 7, Q. B. 635; *Ex parte Swan*, 7, C. B. N. S, 440.—REP.

* So, by giving an unproductive cheque, though the debtor had previously tendered cash *Everett* v. *Collins*, 2 Comp. 505. And see cases cited, Benjamin on Sales, 541, 546.—REP.

† As to the effect of part payment, with respect to the right of stoppage *in transitu*, see *Hodgson* v. *Loy*, 7 T. R. 440; *Feize* v. *Wray*, 3 East, 103. In *Dixon* v. *Howeston*, cited *in notis onte*, observe, there had been a payment, but not on account. In *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 32, it has been held that, though goods have been delivered to a railway company for a vendee, and even after the transitus has been determined, the contract may be rescinded by the vendor, by reason of fraud, and the property re-vested in and resumed by the vendor, if no intermediate interest has vested in an innocent person.—REP.

‡ But were Neill subsequently convicted, see *Nickling* v. *Heaps*, 21 L. T., N. S. 754.—REP.

§ It is observed in Benjamin on Sales (as to which, see note, 5 Ir. L. T. R. 192) that this is a very doubtful

does not necessarily import fraud, but even if it might be implied from the first finding of the jury standing alone, it has been negatived by the second : *R.* v *Walne*, 11 C. C. C. 647 ; *Hawse* v. *Crowe*, Ry. & M. 414. If Neill, when he gave the cheque, had reasonable ground for believing that it would be met, the property having already passed, could not be divested by the circumstance of the cheque not being subsequently productive ; and the vendor's remedy would be to sue for the price of the goods sold. [LAWSON, J.—It is one thing, to buy goods, paying simply by a cheque, which the purchaser may have reasonably expected there were funds then in bank to meet ; but it is another matter, when it is to be met by the proceeds of a subsequent re-sale of those very goods.] A cheque only implies, in the ordinary course of mercantile business, that it will be honoured on due presentment ; *Cumming* v. *Shand*, 5 H. & N. 95. It could not have been presented on the day it was drawn, and the re-sales were early in the following morning before bank hours. The plaintiff's argument must go the length of contending, that the giving of a bill is an implied representation of the solvency of the drawer.* [MONAHAN, C. J.—If a person takes a bill payable *in futuro*, surely he takes his chance, not looking to the credit or solvency of the person against whom it is drawn alone, but being able to discount it.] Unless the goods were obtained by a felony or mere fraudulent trick, the contract was not void. [LAWSON, J.—The fraud here having been by a material misrepresentation, the right of the party was to rescind the contract.] The doctrine that fraud renders contracts voidable not void is a modern graft on the old law that, in case of felony, the property would not pass.* But, in order to entitle the vendor to rescind, it would not be enough that the representation were false in fact, unless it were made fraudulent (not necessarily in a criminal sense), and in the inception of the transaction : *Childers* v. *Wooler*, 2 E. & E. 287 ; Benjamin on Sales, 338, 345. Until disaffirmance, the defendants, as Neill's agents, would be entitled to sell. When was the contract disaffirmed ? Not on the 14th. There never has been an absolute disaffirmance, and the plaintiff still retains the 30s. part payment.† While

authority, " under the modern doctrine, which clearly holds that the property does pass when the *vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention. (p. 325)—REP.

* It may be observed that with respect to the purchase of foreign bills on 'Change, there is, according to the custom of merchants, an implied representation that the purchaser has money ready to pay for them, and that they are to be paid for in cash, three days' grace being allowed. The purchase of bills by a trader, without means of payment, was held to be a fraudulent dealing, though non-payment after the days of grace was stated to have been caused by an unexpected refusal, meantime, of a firm to continue to honour the purchaser's drafts, which the firm had long been accustomed to accept ; *Re Simond*, 26 L. J. Ba. 49. Per Knight Bruce, L. J.; " On the 12th of February, bills were brought on 'Change substantially as a ready money-transaction, for though according to the ordinary course of business, payment was not to be made till the Friday, the purchase having been made on a Tuesday, I am satisfied by the evidence that, on purchases of foreign bills, there is an understanding according to the ordinary course of business, as certain and as clear as if the fact were positively stated, that there is ready-money for the payment."—(*ib.*) See *R.* v. *Hughes*, 1 F. & F. 355, as to false representation respecting the time of payment of a bill of exchange. It may also be noticed that the doctrine of *Bickerdike* v. *Bollman*, 1 T. R. 405, 2 Sm. L. C. 45 (now overruled, *Watson* v. *Minchin*, 1 Jones 583), that a drawer, having no funds in the hands of a drawee, is not entitled to notice of dishonour, has been considered to have proceeded upon the ground that so doing, " like the giving of a cheque upon a bank where the drawer has no funds," (Edwards on Bills, Amer., 429), is a fraud on the part of the drawer : *Clegg* v. *Cotton*, 3 B. & P. 242 ; *Cory* v. *Scott*, 3 B. & Add. 625 ; 1 Parsons on Bills, Amer., 533. But it was held that, if the drawer had reasonable ground to expect that the bill would be honoured on the strength of a consignment, though no effects ever came to the hands of the drawee, or if he had reason to expect that funds would be supplied by a third person, the bill could not be considered mere visionary paper given in bad faith, and the drawer would be entitled to notice of dishonour; *Lafitte* v. *Slatter*, 6 Bing., 623 ; *Rucker* v. *Hiller*, 3 Camp., 217. With respect to promissory bank notes, Littledale, J., observes, " I think that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed," *Camidge* v. *Allenby*, 6 B. & C., 385. But if, though such securities be genuine, they are known to the buyer to be worthless when he passed them, his conduct would be deemed fraudulent (ib., *Read* v. *Hutchinson*, 3 Camp. 352; *Stedman* v. *Gooch*, 1 Esp. 3 ; *R.* v. *Dowey*, 11 C. C. C. 155) ; and the vendor would be entitled to rescind the sale and bring trover.—REP.

* As to the distinction herein, between larceny and false pretences, see note to 5 Ir. L. T. R. 192, and *R.* v. *Prince*, 17 W. R. 179.—REP.

† In *Clough* v. *L. & N. W. Ry.*, L. R. 7 Ex. 26 ; 14 L. J. Ex. 17 ; 20 W. R. 189 ; most fully reported, 25 L. T. N. S. 708 ; Mellor, J., delivering the judgment of the Ex. Ch. (Dec., 1871), says—" the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract, and resume his property." (And see note to 5 Ir. L. T. R. 192). But " no man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money [there a part-payment ; and see *Watson* v. *Russell*, 3 B. & S. 425, 5 *ib.* 968] or other advantages which he has obtained under it." (*ib*): " The commencement of an action of

the contract still subsisted, the cattle were re-sold in open market by the defendants, in their ordinary course of business,* by which they became entitled to commission, and the proceeds were duly applied to pay the debt from Neill to the defendants, the position of both being altered. Any disaffirmance could only take place subject to intervening rights, and as against the defendants the vendor cannot now elect to avoid the sale, to Neill: *Oaks* v. *Turquand*, L. R. 2 H. L. 325; *Kingsford* v. *Merry*, 1 H. & N. 503, 11 Ex. 577; *White* v. *Garden*, 10 C. B. 919; *Masters* v. *Ibberson*, 8 C. B. 100. There is no connexion between the defendants and Neill as conspirators, nor is there any finding that he was their agent. The sale was for cash, and it was Neill's own act to substitute the cheque, and to buy more cattle than he had ready money at the fair to pay for. The findings do not imply previous knowledge on the part of the defendants, but that, at the time of the re-sale, they were aware of the circumstances under which they had been bought; there being a complete and unrescinded sale. Money had and received will not lie unless trover lies, the doctrine of waiving the tort applying only as between the parties to the transaction, and as against a party to the fraud; but, here there was a complete sale to Neill, there was no privity between the plaintiff and the defendants, and there was no agreement by the defendants with the plaintiff that the money was to be held for his use: *Baron* v. *Husband*, 4 B. & Ad. 611; *Williams* v. *Everett*, 14 East 581; *Moore* v. *Bushell*, 27 L. J. Ex. 3; *Hill* v. *Royds*, L. R. 8 Eq. 290.

H. H. Macdermott replied.

Cur. adv. vult.

MONAHAN, C. J.—This case comes before the court upon a motion to enter a verdict for the defendants pursuant to leave reserved, or for a new trial on the ground of misdirection. I do not generally deliver the judgment myself on these motions, where the case has been tried before me; but, as the questions involved have been already before my brothers Keogh and Lawson upon a former motion, in an earlier stage of this case, it has been deemed advisable that, in this instance, I should deliver the judgment. The plaintiff sues in trover and for money had and received. The facts of the case are correctly stated in the report of the former proceedings. But, in order to render the judgment intelligible, I shall shortly refer to the facts as they now appear. The plaintiff, owning some cattle, brought them to a fair in Kilkenny to be disposed of. He there met a person named Michael Neill, with whom he had previously been unacquainted, but whom he knew by appearance; he had seen Neill at fairs on previous occasions, and knew that he was a cattle buyer. Neill bought these cattle, for which he was to pay the plaintiff £141. It was altogether a cash transaction. Therefore, there is no doubt that, at the time of the sale, the plaintiff was entitled to be paid in cash. Neill asked the plaintiff to send the cattle for him to the railway, that they might be forwarded to Dublin; and asked the plaintiff to meet him at a hotel, at one o'clock, in order to receive the price. Assuming that he would be paid as indicated, the plaintiff sent the cattle to the railway for Neill. The plaintiff subsequently returned to the hotel, and there Neill gave him a cheque on the Royal Bank, which the plaintiff accepted, supposing it would be cashed as of course. The plaintiff then lodged the cheque in the Hibernian Bank at Kilkenny. The bank transmitted it to their Dublin correspondents, in order that it should be the next day presented. It happened, however, that it had been incorrectly endorsed; and, in consequence of this mistake, it was returned, but not on the ground of there being no funds. The mistake having been rectified, the cheque was again transmitted, a day or two afterwards, for presentment, but on presentment, payment was refused, on the ground that there were no funds. It further appeared at the trial that Neill had been transacting business for a number of years with the defendants, to whom he used to entrust his cattle to be sold by them as factors. He himself used to frequent the fairs, purchasing cattle on his own account, and not at all as the agent of the defendants. He was considerably in their debt, and for a portion of their demand they held some securities. They had given a guarantee to the Royal Bank in order to secure advances to Neill, which he was in the habit of drawing from the bank. The course pursued was that the defendants, having sold Neill's cattle, used, after deducting a certain percentage, to lodge the balance of the proceeds to his credit in the bank, so that on the following day he would

trover—which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully—cannot, without more, be taken to be an election to avoid the transferer:" *Newnham* v. *Stevenson*, 10 C. B. 723, H. L. So long as the vendor has made no election, he "retains the right to determine it either way, subject to this, that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of the delay, the position *even of the wrong-doer* is affected, it will preclude him from exercising his right to rescind:" *Clough* v. *L. & N. W. Ry.*]—REP.

* See *Fowler* v. *Hollins*, L. R. 7 Q. B. 616.—REP.

have funds in the bank. But on the present occasion, without any previous intimation, and with full knowledge of the circumstances under which the cattle had been bought, and that they were paid for by a cheque, and that there were no funds to meet it except the proceeds of the resale which were to have been lodged, the defendants resolved to close on these proceeds ; they did so, terminated the guarantee, and repaid themselves the money advanced.

At the former trial, I left to the jury four questions. [His Lordship read same, and the findings thereon]. On the findings of the jury, I directed a verdict for the defendant. The case was afterwards argued at considerable length, and judgment was delivered by my brothers Keogh and Lawson. The court were of opinion that the questions then put were not exactly right ; and, I believe, they thought that there ought to be an inquiry as to the state of Neill's account at the time of the passing of the cheque.* On the present trial, had before me at the sittings after last Michaelmas Term, the facts established were substantially alike, and the questions submitted by me were substantially similar, all which questions the jury have answered in the affirmative. [His Lordship read the questions]. On these findings, I directed a verdict for the plaintiff, reserving leave for the defendants to move to have a verdict entered for them, if the court should be of opinion that I ought to have so directed on the findings of the jury. The conditional order to set aside the verdict, pursuant to leave reserved, and to enter it for the defendants has been obtained on the grounds of misdirection. But there is no question before us as to the setting of the verdict aside on the grounds of being against evidence or the weight of evidence. The jury find that, at the time the cheque was accepted, Neill in effect represented that there were, that moment, funds in the bank to meet it. That is a proper finding, even if there were no express representation, because there was an implied representation. The plaintiff was not, from any previous dealings with or knowledge of Neill, likely to have taken the cheque on credit. And the jury were justified in considering that he received it on the faith of an implied promise that there were immediate funds to meet it. It further appears that, at the time of giving the cheque, Neill had reasonable grounds for believing and did believe, not that there were funds then in the bank to meet it, but that there would be funds to meet it when presented ; and I do not quarrel with the finding, because naturally Neill would have expected that the defendants would continue to do as for years they had done, and on the faith of that expectation he brought these cattle to them, in order that the balance of the proceeds should be applied so as to meet the cheque, drawn on the faith that there would be these funds to meet it. But the question now is, under the circumstances, what were the plaintiff's rights ? It was argued, in my opinion successfully, that it would be impossible on these findings to convict Neill of having obtained the goods by false pretences. It is not necessary to go that length ; but I assume that the jury would not find him guilty in this respect, as they would had the cheque been drawn on a bank on which he had no right to draw, and which he had no expectation would have funds to meet it. The question here, however, is, not whether Neill has committed a crime for which he should suffer penal servitude, but, whether there was a false representation—false to the knowledge of Neill at the time—which would entitle the plaintiff, as soon as its being a misrepresentation came to his knowledge, to annul the contract, and to recover the goods in specie if they continued in the hands of the person making the misrepresentation. We entertain no doubt on the subject. The general law—recognised in the well-known case of *Street* v. *Blay*, 2 B. & Ad. 456, holding that a breach of warranty would not entitle the purchaser to rescind the contract, his only remedy being for damages on the breach—is that, if a person makes a representation, not knowing that it is false, the only remedy is by action for the breach of the representation ; while, where there is a false representation—false to the knowledge of the person making it—which will vitiate the sale, the vendor is entitled to rescind the contract itself. Here the jury have found that there was a false representation—false to the knowledge of Neil—and in that finding they were justified. It follows, as of course, that, had Neill retained the cattle, the plaintiff could recover from him in trover, and the cattle having been re-sold, he might waive the tort, according to a well-known doctrine, and sue for money had and received. The defendants are not purchasers without notice, or other meritorious persons who had acquired new rights not possessed by Neill. They received the cattle with full knowledge of the circumstances under which they had been bought by Neill, and that the purchase was upon a false representation. There is, therefore, no distinction between the position of the defendants and that of Neill.

*The verdict was set aside as being against the weight of the evidence.—Rep.

The action could have been maintained against Neill, and it may also be maintained against the defendants. Accordingly, the verdict, as found, must remain as it stands; and the plaintiff is entitled to the costs of both trials and of this motion.

I may add that my brothers Keogh and Morris concur in our judgment.

Lawson, J.—I also concur. This case does not come within the principle laid down in *Kingsford* v. *Merry*, that if there have been a false representation of a material fact, and if it have been a part of the contract, the contract may be rescinded, immediately on the falsity of the representation being discovered. The sale in this case was for cash, and it is clear that, as the paper received was worthless, the plaintiff has a right to rescind the contract; and so doing, he may sue in trover or for money had and received. Do the defendants stand in a better position than Neill? They contend that Neill was innocent in the transaction. The only circumstance that could make Neill innocent was that, by the course of dealing between them, they were to have supplied the funds to meet the cheque, and that he had reason to expect that they would do so; but they deliberately declined to do so, and (to use the phrase of one of the witnesses) "closed upon" the proceeds of the re-sale of the cattle. Were the law to tolerate such a course of proceedings, they might advance any amount to Neill from time to time, and would have nothing to do, in order to repay themselves, but to carry on the affair until he had got cattle sufficient to realise a sum large enough to clear off their demand, and forthwith close upon the product of the sales.* In my opinion, they are not in a better but in a worse position than that of Neill, and they cannot be heard to insist upon the *bona fides* of the transaction. No doubt, if an innocent purchaser intervenes, before the disaffirmance of a contract by the vendor, as, for instance, if there be a sale in market overt, the vendor could not proceed against the *bona fide* transferee. But here, the jury have found that the defendants were aware of the circumstances under which Neill had bought the cattle, and that there were no funds to meet the cheque, except the proceeds of the re-sale of the cattle by them; and in such case, there is no room for the application of any such exceptional doctrine. The verdict must, therefore, be upheld.

Conditional order to enter a verdict for defendants discharged.

* See *Hilliard* v. *Cagle*, referred to in Com. on the principal case, 6 Ir. L. T., 637.—Rep.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

Hilton v. Ankesson.

Fences—Non-liability to repair—Straying of cattle from defects of—Distress damage feasant.

An owner or occupier of lands, though bound to take care that his cattle do not wander from his own land, and stray upon the land of another, is under no legal obligation to put up or maintain a fence so as to prevent the cattle of his neighbour straying upon his land: such an obligation can only be founded upon a statutory obligation, or some agreement or covenant.

The plaintiff was the occupier of a field, which was separated from a field in the occupation of the defendant by a hedge or fence. In consequence of this fence being out of repair, the plaintiff's cattle strayed into the field of the defendant, and were seized by him as a distress damage feasant. Upon an action brought by the plaintiff for this seizure of the cattle, the pleadings raised the issue of whether or not the defendant was bound to repair the hedge through which the cattle escaped, and the only evidence of liability consisted in the practice for fifty years and upwards, of the defendant and his predecessors to repair such hedge:

Held, that this was in itself no proof of such liability.

[Ex. Nov. 21, 1872. 27 J. T. N. S. 519.]

This was a rule calling upon the defendant to show cause why the non-suit should not be set aside, and a new trial be had upon the ground that there was evidence to go to the jury of the defendant's obligation to repair the fence, and evidence to go to the jury to support the plaintiff's case.

The declaration was for trespass and illegally impounding the plaintiff's cattle. The defendant pleaded (second plea) that he seized the cattle as for a distress damage feasant. To this the plaintiff replied (second replication) to the second plea that before the time when the said cattle were so as aforesaid in the close of the defendant, the plaintiff was possessed of a close contiguous and next adjoining the said close of the defendant, and the defendant and all other tenants and occupiers of the last-mentioned close for the time being from time to time whereof the memory of man is not to the contrary, have repaired, and of right ought to repair, the hedges and fences between the last-mentioned close and the said close of the plaintiff as often as need hath been and required in order that cattle being feeding and depasturing in those closes respectively might not err or escape out of the one into the other of them through the defects of the said hedges and fences, and because the said hedges and fences between the said closes of the defendant and the plaintiff, before and at the time when, &c., were ruinous and in decay for want of needful repair thereof, the said cattle then lawfully

being and depasturing in the said close of the plaintiff a little before the time when, &c., erred and strayed out of the last-mentioned close into the close of the defendant through the defects in the said hedges and fences between the said closes, and on that occasion were in the said close in which, &c., until the defendant of his own wrong, and before the plaintiff had notice of the premises and could remove the said cattle, committed the trespass in the declaration mentioned.

The case was tried before Bramwell, B. at the Lewes Assizes. The facts of the trespass and seizure were admitted, and the only question was, as to whether or not the defendant was liable to repair a certain hedge which separated his field from that of the plaintiff, and through the want of repair of which hedge the plaintiff's cattle strayed into the field of the defendant. In support of the plaintiff's case the plaintiff was called, but he had only lived on the farm a few months, and could give no material evidence upon the point; but a Mr. Greenfield who was a former occupier, and also the steward of the landlord, were called, and they proved that the occupier of the defendant's farm had from time to time for fifty years done what repairs were necessary, and Mr. Greenfield upon being asked why he had done so? replied because he thought that every man was bound to keep his hedges in repair. Both the witnesses however failed to show any legal obligation upon the occupier to do the repairs. Upon this, the learned judge directed a nonsuit with leave to move to set it aside. A rule having been accordingly obtained.

Parry, Serjt., and *Joyce*, showed cause.—There was no evidence adduced on the part of the plaintiff to show any obligation on the part of the defendant to keep up or repair the hedge separating the two fields. The law is very clear, and was fully considered in *Boyle* v. *Tamlyn*, 6 B. & C. 329. The marginal note there is, "Where the owner of two adjoining closes (A. and B.), separated by a fence and gate which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant: Held, that the latter was not bound to repair the gate unless he or his vendor had made some specific bargain with the plaintiff to that effect, and that the doing of occasional repairs was not evidence of such bargain." In his judgment in that case Bayley, J., says: "There can be no doubt that the general rule of the law is that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the land of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive unless express words be introduced into the deed of conveyance for that purpose." In the present case there was no evidence whatever to show a legal liability on the part of the defendant to repair the hedge, and the fact that he and his predecessors were in the habit of doing so was no evidence of an obligation. It was the duty, therefore, of the plaintiff to see that his cattle did not escape from his own land on to that of another.

Hawkins, Q. C., and *Grantham*, in support of the rule. It was entirely a question for the jury. The defendant and his predecessors having always repaired the hedge, it was a fair inference to draw that they were under some legal obligation to do so. Mr. Greenfield who occupied before the defendant, stated that he believed he was liable to repair the fence. Where it is necessary for the safe keeping of cattle that there should be a fence, it might properly be assumed from the conduct of the parties that there is a legal liability to repair; if otherwise, it would be necessary that each occupier of adjoining fields should have a separate hedge. They cited *Singleton* v. *Williamson*, 31 L. J. 17, Ex.

KELLY, C. B.—I am of opinion that the nonsuit was right, and that the judge was not justified in leaving any of the facts in the case as evidence of a liability to repair. A liability to repair a fence can only be created by Act of Parliament, or some agreement or covenant which will constitute a binding contract between the parties. Undoubtedly, there may be evidence of such an agreement or covenant by the acts of the parties, as where a person is called upon to repair, and he has repaired accordingly; in such a case, although the evidence would be by no means conclusive, it would still be evidence for the consideration of the jury. But there is no such fact here. The evidence is simply this, that the defendant had kept his land fenced. That, however, was no evidence of a liability to repair. If a man chooses to surround his land with a fence, he may pull the fence down again at any time. He may erect a fence to prevent his cattle from

straying upon the property of his neighbours. That which he had a right to set up he has a right to pull down; and no matter how long he has had it up or repaired it, that affords no evidence of a legal liability to repair it. It would really be alarming if the law were otherwise—if a person who once set up a fence were compelled to keep it up. In this case I cannot see a particle of evidence of the liability of the defendant to repair the hedge; and the learned judge was quite right in so holding.

Channell, B.—I also am of opinion that this rule should be discharged. The question is whether there was a fence which the defendant was liable to repair? I really cannot see that there is any evidence whatever of any such liability. It certainly seems that for fifty years at least the fences were kept up by the defendant and his predecessors; but they were kept up for his own purposes, and not for the sake of his neighbours; and it is argued that such repairs are evidence of an obligation to repair, but no such legal obligation is to be inferred from such acts of repairing.

Pigott, B.—I am of the same opinion that there was no evidence of a liability on the part of the defendant to repair the fence. When the rule was moved I understood that there were additional facts, such as that the defendant had repaired the fence, when it was not necessary that he should have done so for his own purposes, but now it is quite clear that that was not so. It was certainly necessary that some evidence should have been given of the obligation to repair, such as that he had been called upon by his neighbour to repair, and he had repaired accordingly.

Bramwell, B.—I continue of the same opinion that I entertained at the trial. It is quite clear that there is no obligation to fence land that has not been fenced before. Well, if a party is not bound to fence, he may take down any fence that he may have put up, or he may let it fall down. It is said, however, that his repairing the fence is evidence that he is bound to repair it; but as he puts it up for his own purposes he may surely take it down again. Again, it is said that the witness said he thought he was bound to repair his fence, and, therefore, he did repair it. This, however, shows no obligation to repair. There was no requisition to repair, and no repairing in consequence. To hold that a man who erects a fence, and repairs it from time to time, is bound always to continue it, would involve a serious state of things.

Rule discharged.

CORRESPONDENCE.

Election of Mayor—Mode of Voting.

To the Editor of the Canada Law Journal.

Sir,—On the election of Mayor for this city, the question was raised as to the proper mode of proceeding, whether by placing all the candidates before the Council at once, as in an ordinary election by the people, and the one receiving the highest number of votes (although not a majority of the whole Council) being declared elected,—or, by the method heretofore followed, namely, by resolutions and amendments consecutively voted upon until some candidate receives a majority of the whole council. The clerk decided upon the latter as the legal mode: that of resolutions and amendments.

Mr. Harrison in his Manual appears to hold differently—see sections 66, 105, 121 and note (*d*); sec. 129 and note (*s*).

Will you please give your view of the matter?

Yours truly,
R. R. Waddell.

Hamilton, 23rd Jan. 1873.

[The references given to the Municipal Manual by you do not shew either dissent from or assent to the mode adopted by the city, which is, we believe, the rule generally followed.—Eds. L. J.]

REVIEWS.

A Treatise on Criminal Law as Applicable to the Dominion of Canada. By S. R. Clarke, of Osgoode Hall, Barrister-at-Law, Toronto. R. Carswell, 1872. Price $5.

We have looked through this volume with much interest. It should be the aim of the Dominion Legislature, as soon as possible, to make the laws of the several Provinces homogeneous, and so far as Criminal Law is concerned, it has the power to do so without any reference to the several Legislatures of the Provinces. So far as the laws regulating property and civil rights are concerned no Act of the Dominion Legislature to secure uniformity can have effect in any Province until adopted and enacted as law by the Local Legislature thereof. The Dominion Legislature has already to a great extent

made the Criminal Laws of the several Provinces uniform.

Mr. Clarke in view of this fact was encouraged to prepare the Treatise now before us. It will therefore be read with as much interest and be of as much service in British Columbia, Manitoba, Nova Scotia, or any other of the Provinces as in the Province of Ontario where it has been published. And in order that the work may reflect the law of each Province as well as the law of all the Provinces the author has collected decided cases on Criminal Law in the several Provinces. To these he has added the decisions from the English Law reports. The result is a treatise tolerably complete.

The work appropriately opens with an introductory chapter on the Criminal Laws prevailing in the Dominion. It is a valuable historical sketch, and has evidently been prepared with much industry. References to decisions early and late in the several Provinces are frequent. Though by no means a practical chapter, it is one to which the student may refer with profit and advantage.

The next chapter in the work is devoted to the Law of Extradition. The author discusses this difficult and little known branch of law with much intelligence. We have been agreeably surprised to find references made to every Canadian case on this branch of the law of which we have any knowledge. Few men who have not been engaged as counsel in Extradition cases could treat the subject more satisfactorily than Mr. Clarke has done. He has not spared himself any trouble in the collection of his materials. And we must say he has made a very creditable use of them. The chapter on Extradition alone, containing about 50 pages, is worth more than the entire cost of the work to a man engaged or likely to be engaged in an Extradition case. The Treaty in which this country is chiefly interested is of course the Ashburton Treaty. It is restricted in its operation to the crimes of murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the uttering of forged paper. It might with advantage to this country and to the United States be extended to cases of larceny and fraud. It is not to the interest of either country that it should be the asylum of the thieves or swindlers of the other. Our Government is remiss in not having long since done something towards the extension of the Treaty. Canada being a much smaller country as regards popuation than the United States, the proportion of thieves and swindlers that we receive for those that we lose is greatly against us. It is a kind of reciprocity that may be desirable, but we do not like to find "the balance of the trade" yearly so strongly against us. It has always appeared to us that, without reference to the Imperial Government, we have power to expel thieves and swindlers as a matter of simple police and domestic legislation. The Legislature of the old Province of Upper Canada exercised such a power. It is a power as it seems to us as necessary for domestic comfort and self-preservation as the hanging of murderers or imprisonment of thieves who commit crimes in our own country. Should our Government fail to take any step in the matter we hope some independent member of the Dominion Legislature will introduce a measure on the subject, and we cannot but think that the simple pressure of sound reason and ordinary common sense will carry it through. Legislation of this kind is imperatively demanded. This in all probability is the reason that we have not yet obtained it. Legislation in modern days in Canada is not had to meet the requirements of the age, so much as to amuse young members, flatter their vanity and air their eloquence.

The two chapters which we have so far noticed are merely introductory to the main body of the treatise. The remaining chapters are devoted to the following subjects:—Crimes in General, Persons capable of committing Crimes, Offences principally affecting the Government, the Public Peace or Public Rights, Offences against the person, Offences against Property, Perjury, Conspiracy, Annotations of Miscellaneous Statutes, Evidence, Pleading and Practice.

These are the ordinary divisions of treatises on crime. We have neither time nor space to examine these chapters much in detail; but we may say that throughout them we observe a general sprinkling of Canadian cases which cannot be found in any similar treatise. There are some omissions and some typographical blunders, but where there is so much to praise we do not care to censure. We certainly look upon the work as a perform-

ance very creditable to the author. Though a young member of the bar, he has shown great industry and fair judgment. We should be much pleased to find more like him among the junior members of the Bar. In England a successful treatise is very often the introduction of a young man to fame and fortune. It is true that in Canada there is not among members of the Bar such a struggle for existence as in the mother country. But there is no denying the fact that the supply is if anything more than the demand. Young barristers while waiting for briefs cannot do better than employ their time in the production of works which will be of service to the profession and in all probability advance them considerably on the road to professional success.

Too often young men called to the Bar imagine that it is only necessary "to hang out their shingle" to secure clients. Should clients not come as soon as anticipated, hope gives place to despondency, and not unfrequently despondency ends in ruin. The true way to keep the door shut against Giant Despondency is to be the friend of Giant Industry. If the young barrister is not sufficiently sought by clients to keep him busy, let him take up some subject, make it a speciality, read about it, write about it, and so keep himself employed. Such employment has the double advantage of being the antidote of idleness and the harbinger of ultimate success. Let young men called to the Bar avoid idleness as they would poison. And when legitimate employment is not forthcoming, there is a tendency to employment of a kind that is worse than idleness—employment wicked in its inception, and deplorable in its consequences. "Satan finds some mischief still for idle hands to do."

We recommend our professional readers throughout the Dominion to become possessed of this book. No man much engaged in the practice of Criminal Law can afford to be without it, and in many respects we should like to see it recommended as a text book in our Law Schools. Considering the size (over 700 pages) and the importance of the work, as well as its intrinsic value, it has been published at a very moderate price. A large sale will, we are certain, be needed to make the book a financial success and we hope it will have it.

THE MARRIED WOMAN'S PROPERTY ACT OF 1870: Its relation to the doctrine of separate use, with notes by J. R. Griffith, B.A., Oxon, of Lincoln's Inn, Barrister-at-Law. Second Edition. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1873.

This little work comes opportunely for the information of those aspiring legislators, who have brought before the Legislature of Ontario, during the present session, no less than five Bills affecting the rights of married women, and to facilitate conveyance of their real estate. How many more will be introduced before this meets the eye of the reader it is difficult to imagine. We however have alluded to these matters at some length on a previous page, and shall now turn to the book before us.

The Imperial Legislature in 1870 passed an act known as the "Married Women's Property Act, 1870," (33 & 34 Vict. Cap. 93). As compared with our legislation of a similar kind it is very modest. It protects the earnings of married women, declares that deposits of money made by her in certain Savings Banks shall be deemed her separate property, declares that personal property not exceeding £200, coming to a married woman shall be her own, enables her to maintain certain actions in her own name, declares that the husband shall not be liable on ante-nuptial contracts, and makes the wife in certain cases liable to the Parish for the support of her children, and makes a few other harmless provisions in reference to separate estate.

Mr. Griffith in 1871 published an annotated edition of the Act. In the notes he gave a summary of the cases decided in Courts of Equity on the rights and liabilities of married women in relation to their separate estate. Although few cases have arisen under the Act, Mr. Griffith has brought out a second edition of his work. The notes appear to be carefully prepared. If the Act is necessary the notes are necessary. But the fact that so few decisions have been given under it is some evidence that the Act is not either much needed or much used.

The work before us has in its commencement, the Act of 1860 intituled, "An Act to amend the Law relating to the

Property of married women," and very appropriately concludes with, "An Act to amend the law relating to divorce and matrimonial causes in England." The learned editor no doubt felt as we do that the one naturally leads to and feeds the other.

We recommend the book to all who may be interested in understanding this novel kind of legislation. It does not contain more than 50 pages, is neatly printed and well edited.

The Canadian Monthly and National Review. December 1872, and January 1873. Adam, Stevenson & Co., Publishers, Toronto.

With the December number, closes the second volume of this widely circulated periodical. It has now an established reputation, and its influence is becoming wide spread in this Dominion, whilst it is an exponent of Canadian National feeling to "outside Barbarians."

We notice in the December number, a reference to the retirement of Mr. Mowat, which substantially takes the same view of the subject as we have done. It is evidently from the pen of that master of the English language, who is the mainstay of the Review, and who has established it as a power in the land. He says in speaking of "Current Events:"

"Turning to Ontario, we find, as a matter of course, the appointment of Mr. Mowat to the Premiership unreservedly lauded by one party organ, and condemned with equal energy by the other. If the two journalists, instead of serving their parties, were speaking the truth frankly over a dinner table, both would probably agree that the appointment in itself is a very good one—Mr. Mowat being a man of undoubted character and ability—but that the transfer of a judge from the bench to a political office, if it was necessary, was a necessity much to be deplored. In a country like ours, the integrity of the judiciary is at least as important as that of the executive or the legislature; and the integrity of the judiciary can be preserved only by keeping the bench of justice entirely distinct from the political arena. The precedents cited from the English practice by the defenders of Mr. Mowat's appointment, even if they were relevant, would be more honoured in the breach than in the observance. But they are not relevant. The combination of the office of Minister of Justice with that of Chief Judge in Equity in the person of the English Chancellor is, like the judicial function of the House of Lords, a relic of a very ancient state of things anterior to the separation of the judiciary from the executive, or of either from the legislature, and it is rather retained by the national conservatism, than approved by the national judgment. Probably a separate Ministry of Justice will be among the coming legal reforms. Meantime, the Lord Chancellor does not try controverted elections, and it is scarcely possible that any political question should ever come before him in court. That Lord Ellenborough was taken from the Chief Justiceship of a Court of Common Law into the Cabinet is true; but the measure was generally repudiated at the time, and it is certain that it will never be repeated."

The January number opens with an article on the Public Service of the Dominion, considered with reference to the present scale of prices and wages. It scarcely needs much argument to shew the utter absurdity of paying public servants the same salaries now as were paid when the value of money was 40 or 50 per cent. greater than at present. The time has come, when public opinion will insist upon our Judges, for example, being paid salaries which will enable them to live in a style commensurate with their position, and which will command the services of the best men at the Bar. Let not the government think that there is any advantage to be gained, politically or otherwise, by delay in this matter. The country would support any reasonable increase to the salaries of the Judges. It does not need a prophet to tell us that if the present small salaries are continued, inferior men only will accept the ermine, the Bench will sink in public estimation, and the country will be the sufferers in a way, and to a degree, that it is difficult to over estimate. We feel convinced that this is a matter which will commend itself to the careful attention of those who hold the helm of State.

The salaries of these latter again are a delusion and a snare, at least to those who are compelled to give up their private business for public affairs. The mere expense of entertainments devolving upon the leaders of a government would swallow up more than the paltry salaries they are paid, and leave no compensation for the labour and time devoted to the service of their country.

Treatise on the Law of Municipal Corporations, by John F. Dillon, LL.D., the Circuit Judge of the United States for the Eighth Judicial Circuit, &c. Chicago, U. S.: James Cockroft & Co., Publishers, 1872.

We have often had occasion to admire the exhaustive and historical manner in which text writers in the United States treat subjects upon which they write.

This book is no exception. It is a work much needed by the profession, and if we can judge from the short time that we have been able to devote to an inspection of it, one that will amply repay anyone adding it to his library. The treatment is most exhaustive and comprehensive, and the arrangement of the component parts, all, in our opinion, that could be desired. The usefulness of the work in this country will be admitted when it is remembered that a much greater similarity exists between our municipal institutions and those of the United States, than between ours and those of Great Britain. True, municipal government is not carried to the same extent with us as it is in that of the author of this work, but the duties, powers and liabilities of our municipal corporations are much more enlarged than those of England. Thus, it will be found that on reference to this work, many cases will be found "in point," where a search in an English work would be fruitless.

It is not our purpose to attempt anything like an analysis of this volume—one of some 800 pages—peculiar as it is, to a certain extent, in its arrangement; suffice it to say that it commences with a review of municipal institutions, from the almost perfect ones of early Rome down to the present time; contrasting at some length those of England and the United States. The various kinds of municipal corporations, how created and how dissolved, their powers, extent, and liabilities, are discussed. It concludes with a couple of valuable chapters on the various remedies to prevent, correct and redress illegal corporate acts, and the different civil actions against, and liabilities of, such corporations. The volume is enriched by copious notes in which upwards of four thousand cases are referred to, many of them being given in substance. The work is well got up, being printed on excellent paper, with clear bold type, and substantially bound.

The Legal Chronicle, Vol. 1. No. 1, Pottsville, Pa. U. S.

The first few numbers of this new undertaking have reached us. The publication is weekly, and its chief aim, like that of most of the United States weekly publications devoted to law, is to disseminate the opinions of the Courts in advance of the regular reports.

SPRING ASSIZES, 1873.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

1.	Brockville	Tuesday, 11th March
2.	Perth	Monday, 17th "
3.	Cornwall	Friday, 21st "
4.	Kingston	Tuesday, 1st April
5.	Ottawa	Tuesday, 8th "
6.	L'Orignal	Tuesday, 1st May
7.	Pembroke	Monday, 12th "

MIDLAND CIRCUIT.

THE HON. THE CHIEF JUSTICE OF ONTARIO.

1.	Whitby	Tuesday, 11th March
2.	Belleville	Tuesday, 18th "
3.	Napanee	Wednesday, 26th "
4.	Cobourg	Monday, 31st "
5.	Peterborough	Wednesday, 9th April
6.	Lindsay	Tuesday, 15th "
7.	Picton	Tuesday, 13th May

NIAGARA CIRCUIT.

THE HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

1.	Milton	Monday, 10th March
2.	Hamilton	Monday, 17th "
3.	St. Catharines	Monday, 31st "
4.	Welland	Monday, 7th April
5.	Barrie	Monday, 14th "
6.	Owen Sound	Thursday, 24th "

OXFORD CIRCUIT.

THE HON. MR. JUSTICE GWYNNE.

1.	Simcoe	Tuesday, 11th March
2.	Guelph	Friday, 14th "
3.	Stratford	Monday, 24th "
4.	Berlin	Monday, 31st "
5.	Brantford	Friday, 4th April
6.	Woodstock	Tuesday, 15th "
7.	Cayuga	Tuesday, 22nd "

WESTERN CIRCUIT.

THE HON. MR. JUSTICE WILSON.

1.	Sandwich	Tuesday, 11th March
2.	Sarnia	Tuesday, 18th "
3.	London	Monday, 24th "
4.	Chatham	Monday, 7th April
5.	St. Thomas	Tuesday, 15th "
6.	Goderich	Monday, 12st "
7.	Walkerton	Monday, 28th "

HOME CIRCUIT.

THE HON. MR. JUSTICE GALT.

1.	Brampton	Tuesday, 11th March
2.	Toronto	Wednesday, 26th "

CHANCERY SPRING SITTINGS, 1873.

HOME CIRCUIT.

THE HON. THE CHANCELLOR.

1.	St. Catharines	Wed'day, 19th March
2.	Guelph	Monday, 24th "
3.	Hamilton	Tuesday, 1st April
4.	Barrie	Wednesday, 9th "
5.	Brantford	Wednesday, 16th "
6.	Simcoe	Wednesday. 23rd "
7.	Owen Sound	Wednesday, 30th "
8.	Whitby	Wednesday, 7th May

EASTERN CIRCUIT.

THE HON. VICE-CHANCELLOR STRONG.

1.	Kingston	Tuesday, 25th March
2.	Belleville	Tuesday, 1st April
3.	Cobourg	Monday, 7th "
4.	Peterborough	Monday, 14th "
5.	Lindsay	Thursday, 17th "
6.	Brockville	Wednesday, 23rd April
7.	Cornwall	Tuesday, 29th "
8.	Ottawa	Tuesday, 6th May

WESTERN CIRCUIT.

THE HON. VICE-CHANCELLOR BLAKE.

1.	Walkerton	Tuesday, 8th April
2.	Sarnia	Tuesday, 15th "
3.	Sandwich	Friday, 18th "
4.	Chatham	Wednesday, 23rd April
5.	Woodstock	Tuesday, 6th May
6.	Stratford	Monday, 12th "
7.	Goderich	Friday, 16th "
8.	London	Wednesday, 21st May

THE HON. VICE-CHANCELLOR STRONG.

Toronto		Monday, 10th March

APPOINTMENTS TO OFFICE.

ATTORNEY GENERAL FOR ONTARIO.

Hon. OLIVER MOWAT, to be Attorney-General for the Province of Ontario, in the place and stead of Hon. Adam Crooks resigned.

TREASURER OF ONTARIO.

Hon. ADAM CROOKS, to be the Treasurer of the Province of Ontario, in the place and stead of Hon. Alex. Mackenzie resigned.

PROVINCIAL SECRETARY.

Hon. TIMOTHY BLAIR PARDEE, to be Secretary and Registrar of the Province of Ontario, in the place and stead of Hon. Peter Gow resigned.

VICE-CHANCELLOR.

SAMUEL HUME BLAKE, of the City of Toronto, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-Law, to be one of the Vice-Chancellors of the Court of Chancery of the Province of Ontario, vice the Honourable Oliver Mowat resigned. (Gazetted Nov. 12th, 1872.)

MASTER IN ORDINARY IN CHANCERY.

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, Barrister-at-Law, in the room and stead of John Alexander Boyd, Esquire, resigned. (Gazetted 21st December, 1872.)

REFEREE IN CHAMBERS.

GEORGE SMITH HOLMESTED, of the City of Toronto, Esquire, Barrister-at-Law, in the room and stead of Thomas Wardlaw Taylor, Esquire, resigned. (Gazetted 21st Dec., 1872.)

DEPUTY JUDGE.

ROBERT P. JELLETT, of the Town of Belleville, in the Province of Ontario, and of Osgoode Hall, Esq., to be Deputy Judge of the County Court of the County of Prince Edward. (Gazetted December 6th, 1872.)

JUNIOR JUDGES.

ISAAC FRANCIS TOMS, of the Town of Goderich, in the County of Huron, in the Province of Ontario, Esq., and of Osgoode Hall, Barrister-at-Law, to be Junior Judge of the said County of Huron, in the Province of Ontario. (Gazetted Dec. 7th, 1872.)

JOHN ANDERSON ARDAGH, of the Town of Barrie in the Province of Ontario, and of the Osgoode Hall, Esquire, Barrister-at-Law, to be the Junior Judge of the County Court of the County of Simcoe in the Province of Ontario. (Gazetted 12th November, 1872.)

SHERIFF.

JAMES ALBRO HALL, of the Town of Peterborough, Esquire, to be Sheriff of and for the County of Peterborough, in the room and stead of James Hall, Esquire resigned. (Gazetted Nov. 9th, 1872.)

REGISTRARS.

SAMUEL LOUNT, of the Town of Barrie, Esquire, of and for the County of Simcoe, in the room and stead of George Lount, Esquire, resigned. (Gazetted November 23th, 1872.)

JAMES WALLACE ASKIN, of the Town of Sandwich, Esquire, of and for the County of Essex, in the room and stead of JOHN A. ASKIN, Esquire, resigned. (Gazetted 7th December, 1872.)

QUEEN'S COUNSEL.

DANIEL McMICHAEL, of Toronto, Esquire.

CHRISTOPHER SALMON PATTERSON, of Toronto.

EDMUND BURKE WOOD, of Brantford.

JOHN T. ANDERSON, of Toronto.

THOMAS MOSS, of Toronto, (Gazetted December 13th, 1872.)

ROBERT STUART WOODS, of Chatham, Esquire.

JAMES A. HENDERSON, of Kingston, D.C.L.

D'ARCY BOULTON, of Toronto. "

ALEXANDER LEITH, of Toronto. "

THOMAS ROBERTSON, of Dundas. "

The Hon. JOHN O'CONNOR, of Ottawa.

HECTOR CAMERON, of Toronto, Esquire.

JAMES BEATY, Junior, of Toronto, "

GEORGE A. DREW, of Elora, "

JAMES MACLENNAN, of Toronto, "

DAVID TISDALE, of Toronto, "

DALTON McCARTHY, of Toronto, "

HEWITT BERNARD, of Ottawa, Esquire, Deputy of the Minister of Justice. (Gazetted December 18th, 1872.)*

NOTARIES PUBLIC.

WILLIAM FREDERICK WALTER, of the City of Hamilton, Esquire, Barrister-at-Law, and HARRY EDMONDS FEATHERSTON CASTON, of the City of Toronto, Gentleman, Attorney-at-Law. (Gazetted Oct. 19th, 1872.)

ALLAN CASSELS, of the City of Toronto, and JAMES WILLIAM SHARPE, of the Village of Dresden, Esquires, Barristers-at-Laws and ERNEAST SEEBER, of the Village of Neustadt, Esquire. (Gazetted October 26th, 1872.)

HERBERT CHARLES GWYN, of the Town of Dundas, Gentleman, Attorney-at-Law. (Gazetted November 22nd, 1872.)

WILLIAM HORTON, of the City of London, Esquire, Barrister-at-Law, and JAMES GOWANS, of the Town of Sarnia, Gentleman, Attorney-at-Law. (Gazetted Nov, 9th, 1872.

DUNCAN MORRISON, of the Town of Owen Sound, Esquire, Barrister-at-Law. (Gazetted November 23rd, 1872.)

COLIN McDOUGALL, of the Town of St. Thomas, Esquire, Barrister-at-Law. (Gazetted Nov. 20th, 1872.)

JOHN MATHESON, of the Town of Woodstock, Gentleman Attorney-at-Law and CLAUDIUS TIDEY, of the Village of Norwich, Gentleman. (Gazetted December 14th, 1872.

ISRAEL NEWNHAM WINSTANLEY, of the Village of Fergus, Esquire, Barrister-at-Law; WILLIAM F. ELLIS, of the Town of St. Thomas; THEOPHILUS HENRY ALEXIS BEGUE, of the Town of Dundas, and THOMAS WELLESLEY McMURRAY, of the Village of Ancaster, Gentleman, Attornies-at-Law. (Gazetted Dec. 21st, 1872.)

ASSOCIATE CORONERS.

ARCHIBALD CONNELL SINCLAIR, of the Village of Port Elgin, Esquire, M.D., for the County of Bruce.

SAMUEL BRIDGLAND, of the Village of Bracebridge, Esquire, M.D., for the Counties of Simcoe and Victoria. (Gazetted Oct. 19th, 1872.)

WILLIAM REAR, of the Village of Oakwood, Esquire, M.D., for the County of Victoria. (Gazetted November 2nd, 1872.)

WILLIAM FREEMAN, of the Village of Georgetown, Esquire, M.D., for the County of Halton. (Gazetted Nov. 16th, 1872.)

J. A. MACDONELL, of the Village of Thunder Bay, Esquire, M.D., for the Provisional Judicial District of Algoma. (Gazetted Nov. 23rd, 1872.)

WILLIAM COBURN, of the Village of Oshawa, Esq., M. D. for the County of Ontario. CHRISTOPHER KNOWLSON, of the Village of Omemee, Esquire, for the County of Victoria. (Gazetted Dec. 14th, 1872.)

JAMES TAYLOR, of the Village of Para, Esquire, M. D., for the County of Bruce. (Gazetted Dec. 21st, 1872.)

JOHN BARNHART, of the Town of Owen Sound, Esquire, M.D., in and for the County of Grey.

EDWARD OLIVER, of the Village of Mooretown, Esquire, M.D., in and for the County of Lambton. (Gazetted 7th December, 1872.)

* Many of our readers will remember that Mr. Bernard, when engaged in the practice of his profession at Barrie, in partnership with the Hon. James Patton, Q. C., was one of those who contributed largely to the success of the early volumes of the *Upper Canada Law Journal*. We now congratulate him upon his promotion, so well bestowed upon one of his extensive legal attainment, and who holds an office of such great importance and responsibility.—Eds. L. J.

Law Society—Michaelmas Term, 1872.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Michaelmas Term, 36th Victoria.

During this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :

George Dormer, Beaufort Henry Vidal, Frederick Wm. Monro, Charles Corbould, James Fletcher, John Alex. Gemmell, William Roaf, John Augustus Barron, Roderick Stephen Roblin, Martin Malone, John Rowe, Alexander Fraser McIntyre, James Robert Strathy, Robert McMillan Fleming. Charles Henry Ritchie, George McNab, John Akers, John White, John Andrew Paterson, Robt. Sedgewick, Newman Wright Hoyles, James Bruce Smith, Thos. Langton, Hugh John Macdonald, Wm. Redford Mulock, Richard John Wickstead.

And on Tuesday, the 19th November, the following Gentlemen were admitted into the Society as Students of the Laws, their Examinations having been classed as follows :

University Class.

Albert Clement Killam, Charles Joseph Holman, John Crerar, Albert Lewis, Henry James Scott, Dennis Ambrose O'Sullivan, Eugene McMahon.

Junior Class.

Thomas Dalziel Cowper, James Dowell, Jarid Alex. Morton, Luther Kendall Murton, Samuel D. Raymond, Harry Symons, Louis Adolphe Olivier, Thomas Ellis Dunlop, Thomas Edward Lawson, Arthur O'Leary, Wm. John Franks, Albert Whitman Kinsman, Frederick J. Vannorman, Jacob L. Whiteside, James Fullerton, John Jerman Manning, George Miles Lee, Daniel Webster Clendinnan, Lawrence H. Dampier, Edward Jackson Stuart, John Franklin Monk, Jas. Saunders Nainer, John Bishop, Raynaldo Wigle, James Bond Clarke.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3 ; Virgil, Æneid, Book 6 ; Cæsar, Commentaries Books 5 and 6 ; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3 ; Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows :—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding. —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1*st year.*—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2*nd year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3*rd year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4*th year.*—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.